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Supreme Court of the United States

October Term, 1978

No. 78-1730

HELEN SMITH,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

After trial, Recommendations on Findings (herein "ROF") were made by a Magistrate[1] (Appendix A); the District Court adopted the ROF without change (App. B); the Court of Appeals affirmed by memorandum decision (App. C) and denied rehearing and suggestion for rehearing en banc (App. D).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 9, 1979; rehearing and suggestion for rehearing en banc were denied by Order filed April 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]The order was specifically "Pursuant to 28 U.S.C. Section 636(b)(2). . . .", but the District Court, in its review, applied the *clearly erroneous* test, nonetheless. *See, Matthews v. Weber,* 423 U.S. 261, 264-69 (1976).

QUESTIONS PRESENTED FOR REVIEW.

1. Where there was neither issue nor notice that Petitioner was being charged with conversion, where no witness testified that Petitioner was a converter, where no written evidence was introduced or admitted to show Petitioner was a converter, where objection to opposing counsel's questions about missing items was sustained, should a conversion judgment of nearly $50,000 against Petitioner be permitted to stand?

2. Should a 104-page narrative "Recommendation on Findings", that is more concerned about Marie Antoinette and other extraneous matters, some expressly stated to be reserved for other pending actions, that lists many reasons for ultimate findings which are clearly erroneous, but fails to state which reasons support which ultimate finding, and that fails to make specific findings on principal disputed factual matters, be remanded?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Two provisions are involved in this case. The first is Fed. R. Civ. P. 52(a), which provides in pertinent part: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . ."

The second provision is U.S. CONST. amend. V, which provides in part: "No person shall . . . be deprived of . . . property, without due process of law."

STATEMENT OF THE CASE.

1. Proceedings in the Trial Court.

These proceedings stem from a written agreement between Petitioner and the Westgate-California Corporation[2] for Petitioner to provide furniture and furnishings to two hotels to be constructed in downtown San Diego.

In the first of two consolidated actions the Federal Deposit Insurance Corporation ("FDIC"), as receiver for the United States National Bank of San Diego ("USNB"), sought to foreclose a deed of trust on the Westgate Plaza Hotel. As part of this foreclosure proceeding a District Judge on April 29, 1974, ordered Petitioner to show cause why "a judicial determination should not be made" as to who owned hundreds of valuable antique furniture items "on the premises of the Westgate Plaza Hotel." Most of the antiques in question were located either in her apartment or in storage areas set aside for Petitioner and under her lock and key. Some antiques were located in public areas of the hotels.

The FDIC subsequently sold the Westgate Plaza Hotel to Respondent California Little America Co., and on December 10, 1974, the second action, for unlawful detainer of the apartment, was filed. It is not pertinent to this Petition.

The District Court heard evidence, referred the parties to a Magistrate for more evidence and to make the ROF (App. A). No party was given an opportunity to file objections before the Magistrate, and the District

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[2]The agreement was made in April, 1967 before Petitioner married Mr. C.A. Smith. The Westgate-California Corporation and related affiliates are hereafter referred to as "Westgate."

Court took the "clearly erroneous" standard of review (App. B, 104).

The antique furniture judgment (Action No. 74-50-E; App. F) denied Petitioner's claims to 363 items of furniture out of 485 to which she laid claim and, also, awarded $49,766.00 plus interest at 7% from December 1, 1969, against her for so-called conversion of "missing Jean Owings furniture" (App. F; CT 1087). The unlawful detainer judgment (Action No. 74-576-E, App. F; CT 1468) restored the apartment, awarded rent and attorney fees, but the matter of offset was expressly left to the bankruptcy court (App. A, 21; CT 637).

2. Proceedings in the Court of Appeals.

In affirming the conversion judgment and answering the contention that there was no issue or evidence about conversion at trial, the Court of Appeals erroneously stated, "the issues were expanded [at trial] in this respect," without citation to the record. Also, ignoring a sustained objection at trial to the suggestion that Petitioner might be charged for missing furniture, the Court of Appeals stated "much testimony and documentary evidence respecting the missing items was received *without objection*." App. C, 114-15 (Emphasis added unless noted).

The Court of Appeals further ignored the contention that the ROF was totally inadequate and clearly erroneous; it did not discuss any evidence or cite any law. None of the exhibits or evidence admitted at the trial were brought up by the appellate court. The approximately 150 pages of briefing by each side was dealt with in a 9-page opinion, 40% of which merely quotes the ROF.

The petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT.

1. This case merits review on certiorari because the Magistrate's ROF is in direct conflict with Fed. R. Civ. P. 52(a), this Court's requirements for adequate findings as expressed in *Commissioner of Internal Revenue v. Duberstein,* 363 U.S. 278, 292-93 (1960), and *Kelley v. Everglades Drainage District,* 319 U.S. 415, 418, 420-22 (1943), as well as numerous decisions of other Courts of Appeal. It is time again, after 19 years, for the Supreme Court to speak on this important matter.

2. This case merits review on certiorari because the conversion judgment against Petitioner without notice or evidence, over objection, and without any opportunity to defend is so unfair it is clearly a violation of procedural due process. *Armstrong v. Manzo,* 380 U.S. 545 (1965).

3. This case merits review on certiorari because the ROF, its adoption by the District Court, and erroneous affirmance by the Court of Appeals constitutes such a substantial departure from the accepted and usual course of judicial proceedings that it requires the supervisory evenhandedness of this Court.

ARGUMENT.

I

THE "RECOMENDATION ON FINDINGS" DOES NOT COMPLY WITH RULE 52(a).

A. The Law Requires Carefully Drawn and Specific Findings.

In an oft-quoted case, obfuscation of errors of law behind careless fact-finding was condemned:

> Chief Justice Hughes once remarked, "An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' " . . . [His] comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. . . . The judiciary should at least measure up to the same standards.
>
> . . . The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. . . . And it is not a light responsibility since, unless his findings are "clearly erroneous," no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.

United States v. Forness, 125 F.2d 928, 942-43 (2nd Cir. 1942).

The real danger of carelessly or unscrupulously drawn findings is commented on in numerous cases. A few

examples: Findings "couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification . . . shedding some light on the reasoning employed invite closer scrutiny." *Russo v. Central School District No. 1, Towns of Rush, etc.,* 469 F.2d 623, 628 (2nd Cir. 1972). A District Court should not leave the reviewing court with "the heavy chore of reviewing sundry, contradictory assumptions any of which could have led to the conclusory findings." *Welsh Co. of California v. Strolee of California, Inc.,* 290 F.2d 509, 511 (9th Cir. 1961). There must be "subsidiary facts to undergird the ultimate facts." *Causey v. Ford Motor Co.,* 516 F.2d 416, 420-21 (5th Cir. 1975).

The 104-page ROF contained clear errors of law, was overly broad, frequently irrelevant, and failed to make essential findings.

B. Critical Findings of Fact Were Not Made.

It was correctly stated by the Court of Appeals that the "issue presented by the dispute was whether each of 430 [*sic* 485] different items was . . . owned by [Petitioner] or by [Westgate]." App. C, 109.

Of these items in dispute 363 were taken from Petitioner but there are specific findings on only 23! Of the remaining 340 at least 126 were awarded to Westgate in a group simply because Petitioner was said to be Westgate's agent. As explained hereafter and in the Court of Appeals, this was legal nonsense.

As to the remaining 214 items taken from Petitioner there is no finding or explanation whatsoever whether they were given to Westgate because (1) the Magistrate could not tell if the item was invoiced to Westgate

(App. A, 37-38; CT 657, lines 2-7) or (2) because Petitioner was Westgate's agent and it did not matter that the items were not invoiced to Westgate (App. A, 38-39; CT 658, lines 4-9, *et seq.*), or (3) Petitioner's data were unreliable (App. A, 95; CT 726, lines 9-10), or (4) Petitioner offered no data (App. A, 95; CT 726, line 10), or (5) Petitioner offered inconsistent data (App. A, 95; CT 726, line 10), or (6) a sale to Westgate had been made (App. A, 95; CT 726, lines 11-12). Thus, the findings are not sufficiently specific under Fed. R. Civ. P. 52(a), and meaningful review of the trier of fact on 214 items is impossible.

The ROF is clear in several significant respects. First, Petitioner paid for the disputed items and her books of account so showed. App. A, 38; CT 657. Second, there is no finding that Westgate paid for any disputed item, with the exception of an antique piano and items as to which Petitioner withdrew her claims. Third, of the 363 items taken from Petitioner, 295 were under her lock and key, either in her apartment or her storage areas. App. A, 88; CT 716. Thus, she was entitled to a presumption of ownership as to these, and except for the piano and unclaimed items no witness or evidence suggested the items in her apartment or under her lock and key did not belong to her.

It should have been logical and straightforward for the Magistrate to make findings on who purchased any particular item, who paid for it, and if Petitioner bought and paid for it, whether it was subsequently sold to Westgate and whether Westgate paid for it. This he did not do.

C. Irrelevancies Diverted the Fact Finder.

In light of the basic disputes—ownership of furniture, and offset of rent for the Hotel apartment—a great many extraneous matters became "findings."

(1) "Marie Antoinette," "False Idols," "Wisdom of the Ages" and Other Irrelevancies.

The date when Mr. Smith and Petitioner first met (App. A, 3; CT 618), what they discussed (*Id.*), when they were married (App. A, 4; CT 619), Petitioner's "new identity" (*Id.*), that Westgate's Trustees were trying to "stem financial hemorrhages" (App. A, 6; CT 620), the "wisdom of the ages" (App. A, 12; A, 6; CT 627), that the record reflects "sadly" (App. A, 18; CT 633); that "equity came into existence because the worship of . . . false idols leads to injustice" (App. A, 19; CT 634); the concept of piercing the " 'separate property' veil" of husband and wife (*Id.*) surely had no place in findings under Rule 52(a).

Other irrelevant matters that became "findings" and must have distracted the finder of fact from the task at hand are "*The Story of International Interior Designs*" (App. A, 21; CT 639); "the elegance and charm of the eighteenth century world of French aristocracy that has long since ceased to exist" (App. A, 27; CT 646); "mass survival" in "the modern world" (*Id.*); "the indulgences of the privileged class" (*Id.*); "oasis of aristocracy" (*Id.*); "a pseudo-reality world of Louis XV, Louis XVI, Marie Antoinette and Madame de Pompadour" (*Id.*); "royal conspicuous consumption and self-indulgence" (App. A, 28; CT 646); "the privileged aristocracy" (App. A, 31; CT 650); "Marie Antoinette [not believing] that the people were starving" (App. A, 99; 732); and "The light of human experience and common sense" (App. A, 6; CT 724).

(2) Petitioner's Compensation Was Irrelevant.

The Magistrate stated, "[H]er *net* profit realized was in excess of $900,000.00." App. A, 25; CT 642 (Emphasis by court). Petitioner had "truly a minimum risk type of operation." App. A, 23; CT 641. "Helen Smith was thus able to realize financial rewards for her efforts." App. A, 99; CT 732. However, the amount and reasonableness of the compensation due or actually received by Petitioner were never an issue; no one testified as to whether or what she was paid; no expert was called on the issue of reasonableness. Indeed, the Magistrate recognized the Trustees of Westgate had filed a separate action claiming Petitioner made too much. App. A, 21; CT 637. *Trone v. Smith,* U.S. Dist. Ct. (So.Cal.) No. 75-0213-E.

(3) Agency Notions Were Irrelevant.

The Magistrate wrote over 25 pages of narrative on whether Petitioner was Westgate's agent. App. A, 27-52; CT 645-71. The analysis did not cite one case, one statute, one treatise, one law review article, or any authority except "See Restatement 2d 'Agency'." App. A, 47; CT 666. Little wonder that the agency pigeonhole was not recognized as a red herring.

The basic reason agency notions are irrelevant is that under California law rights and duties between principal and agent are determined by their agreement. *Meyers v. Guarantee Savings & Loan Ass'n.,* 79 Cal. App.3d 307, 321 (1978). Restatement (Second) Agency (1957) §376. Since Trustees take the title of the bankrupt (*Matter of Forester,* 529 F.2d 310, 316 (9th Cir. 1976); *Matter of Paderewski,* 564 F.2d 1353, 1356 (9th Cir. 1977)) and since, as between Westgate and Petitioner, these antiques concededly belonged to her, agency-fiduciary principles were not material.

The irrelevancy of the agency label was repeatedly urged below, but the Court of Appeals incorrectly stated that the agency finding "is the conclusion that is most strenuously challenged on appeal." App. C, 113.

D. The Findings Contain Critical Ambiguities.

The ROF correctly noted a sale from Petitioner to Westgate was contemplated before title would pass. For example, Helen Hill "immediately set about acquiring items to *sell* to Westgate" (App. A, 4; CT 619, lines 8-9); "[she] married . . . [and] continued . . . to *sell* them to Westgate." *Id.,* lines 14-17; after "the first hotel . . . was opened in May 1969 . . . IID continued to . . . *sell* furnishings to Westgate". *Id.,* lines 19-22; after "the second hotel . . . was opened August 30, 1970, . . . [she continued] to acquire and *sell* furnishings and fixtures to Westgate". App. A, 5; CT 619, lines 26-29; "Helen Hill acquired items to be *sold* to Westgate". App. A, 22; CT 639, lines 28-29; "[IID] would invoice Westgate . . . for items *purchased* . . . for the Westgate account". App. A, 22; CT 640, line 34.

Both the basic agreement (Exhibit 1) and a 1971 modification (Exhibit 2) required prior approval of Westgate before any sale. The Magistrate wrote "her purchasing function was subject to *prior approval* [by Westgate]." App. A, 45; CT 664. This agreement was completely consistent with commercial practice. *See* Cal. Comm. Code §2305(2); *California Lettuce Growers v. Union Sugar Co.,* 45 Cal.2d 474, 482, 484 (1955).

Yet the critical step—ascertaining whether a sale had in fact taken place—was never undertaken by

the fact finder. He stopped when he discovered the agency pigeonhole. Thus, the "findings" say on the one hand *sales* which required prior approval were contemplated but on the other hand say whether a sale occurred made no difference because petitioner was Westgate's agent. This ambiguity demonstrates the lack of specificity and the erroneous conclusion of law.

E. The Form of the Findings Hid Critical Errors in Reasoning.

Compounding the inadequacies of insufficient and irrelevant findings are important legal and factual statements that are wrong.

(1) The Agency-Equals-Ownership Error.

As noted above, at least 126 valuable antiques bought and paid for by Petitioner were taken from her merely because the Magistrate incorrectly held that items bought and paid for by an agent automatically belong to the principal. This conclusion of law was unsupported by any citations, either by the Magistrate or the Court of Appeals, and is manifestly wrong. The duties of an agent to his principal are based on their agreement. *Cessna Aircraft Company v. Aerial Surveys of Pittsburgh, Inc.*, 270 F.2d 206 (10th Cir. 1959); *Anderson v. Badger*, 84 Cal.App.2d 736, 740-41 (1948); *See, Edwards v. Freeman*, 34 Cal.2d 589, 592 (1949); *Santos v. Wing*, 197 Cal.App.2d 678, 683 (1961). *Cf.*, Cal. Civ. Code §§ 2295, 2299.

(2) The Confusion of Goods Error.

To overcome the strong ownership presumption which the law gives to the possessors of personal property (Cal. Evid. Code §§637, 638; *Lane v. Whitaker*, 50 Cal. App. 2d 327, 330 (1942)), the Magistrate relied on the doctrine of confusion of goods. App. A, 89-90; CT 717. His references to the law are misleading and incomplete. App. A, 89; CT 716.

At the very worst where the confusion is the clear result of the intentional wrongful act of one party, the effect of the rule is only to put the burden of identifying his goods on that party. *See*, 2 *Kent, Commentaries on American Law* (14th ed. 1896) 571; *Brown, The Law of Personal Property* (3d Ed. 1975) 6.11; *Lightner Mining Company v. Lane*, 161 Cal. 689, 708 (1911); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973). It is still incumbent on the fact finder to analyze evidence as to specific items in dispute and to determine if they are identifiable and, if they are, to then divide the indistinguishable mass according to the aliquot share of how much each claimant paid. *Childs, Principles of The Law of Personal Property, Chattels and Choses* (1st ed. 1914) §285.

(3) The Westgate-Records-in-Shambles Error.

The Court of Appeals noted that the Magistrate wrote "the books and records of Westgate clearly reveal . . . [failure to record] the antique items acquired from Mrs. Smith." App. C, 110. But as pointed out in our Opening Brief, and in our Petition for Rehearing, Westgate's books and records were never allowed in evidence!

Also, as the Court of Appeals noted, the Magistrate wrote there was no "credible effort to maintain a fixed asset inventory for Westgate." App. C, 110. But again, this is wrong. When the Westgate inventory

list was uncovered near the end of trial, it was not let into evidence.

The Court of Appeals did not even look at the original business records of IID (Exhibits 56, 56A, 56B, 57), which were in evidence. These distinctly showed who the 126 items had been purchased from (in the Purchase Journal) and that they were still carried in the inventory account.

(4) The Credibility Error.

The Court of Appeals noted the Magistrate "recites instance after instance in which . . . evidence . . . was devastatingly impeached." App. C, 113. But without going behind the Magistrate's words a court of review would fail to discern that the "instance after instance" applied to only 30 of the 485 items in dispute. Of the 30, claims to one-fourth were withdrawn at trial before the ROF was written. None of them were in Petitioner's storage areas, only four were in her apartment, and the rest were in public areas.

More importantly, credibility is here largely irrelevant. Suppose Petitioner were to become unavailable, and her documents destroyed. The foregoing errors could still be manifest. The written documents, conduct of the parties, and presumptions would still entitle Petitioner to most of the items taken from her. Lack of credibility, while impeaching, is not evidence. It cannot overcome a presumption or a conclusion based on proper evidence. *Moore v. Chesapeake & Ohio Railway Company*, 340 U.S. 573, 577-78 (1950); *Janigan v. Taylor*, 344 F.2d 781, 784-85 (1st Cir. 1965); *Dyer v. MacDougall*, 201 F.2d 265, 269 (1st Cir. 1952).

(5) The Authority-Equals-Converter Error.

The ROF "found" certain items "are still missing and unaccounted for" (App. A, 60; CT 680) and, "only two persons were in a position of authority over the movement of these items, . . . Mr. and Mrs. C. A. Smith; and they are *therefore* jointly and severally liable. . . ." App. A, 61; CT 681.

Apart from the ludicrous holding that *Mr.* Smith—a non-party—was liable for conversion, this reasoning is also erroneous under California law. There must be an exercise of dominion with the purpose of depriving the rightful owner. *Jordan v. Talbot*, 55 Cal. 2d 597, 610 (1961); *Zaslow v. Kroenert*, 29 Cal. 2d 541, 550 (1946); *Itano v. Colonial Yacht Anchorage*, 261 Cal. App. 2d 84, 89 (1968). *See also, George v. Bekins Van & Storage Co.*, 33 Cal. 2d 834, 838 (1949). Consequently, having been in a "position of authority" over items said to be missing is insufficient to support a judgment of conversion.

II
THE CONVERSION JUDGMENT VIOLATES DUE PROCESS.

A. There Was No Notice of the Issue.

Petitioner's Opening Brief in the Court of Appeals argued that she was never, before or during the trial, charged to return or pay for missing furniture, and that from the outset the furniture litigation was a replevin action wherein she had the burden of establishing *her* claim to items located in the Westgate complex. In apparent agreement the Court of Appeals maintained, "the issues were [nevertheless] expanded" at trial. App. C, 115. But, as will be shown, this statement is patently incorrect.

The conversion judgment "violates the most rudimentary demands of due process of law" because a meaningful hearing in a meaningful manner on whether any items were indeed missing, and whether Petitioner, or someone else, had indeed moved or appropriated them never took place. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Irresponsible action by a trial court has been completely masked. *See, Bailey v. Weinberger*, 419 U.S. 953 (1974). Procedural fairness requirements have been ignored. *Cf., American Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230, 1244 (3rd Cir. 1975).

The only testimony about the so-called missing items occurred on August 21, 1975. A transcript of that day's proceedings is reproduced verbatim in Appendix E hereto. It contains the only testimony about the only document referenced by the ROF (Ex. JJJ) (App. A, 56; CT 676) that suggests anything was missing.

During this entire day no one even mentioned the word "converter," much less that Petitioner's conduct was being reviewed to determine whether she had wrongfully taken or handled Westgate's antiques. The only testimony about the only exhibit pertaining to allegedly missing items came from Petitioner. The whole purpose of the examination, after a relevance objection had been sustained to questions about items not claimed by her (App. E, 132-33; TR 2055-57), was to aid counsel for FDIC in locating or identifying items purchased by Westgate six years before. App. E, 181-82; TR 2108. The FDIC attorney wanted to ask whether, "Mrs. Smith . . . knew where any of these items were that were missing." App. E, 182; TR 2109, lines 20-21. Petitioner's counsel observed that "[for that purpose] we can go through it [Ex. JJJ] rather quickly." *Id.* at 2109, line 25.

The FDIC attorney further stated:

> Mrs. Smith, let me clarify the record so we don't have any misunderstandings: When we say "missing" on this list *all* we are suggesting is that we have been unable to identify those items.

App. E, 184; TR 2112.

When Petitioner remembered that six small compotes from the auction were in her La Jolla home (App. E, 203; TR 2132, lines 25-28), the Court asked if she had any objection, "as a token of good faith, to just return these to whomever?" App. E, 203-04; TR 2133, line 20. She agreeed—not as one charged with conversion—but as an aid to the FDIC attorneys.[3]

At one point the Court did state about item 262 (App. E, 201; TR 2130), the "whole issue" was "maybe you've gotten them hidden someplace?" App. E, 202; TR 2132, line 4. But the only *testimony* or evidence was Petitioner's answer, "I have none of these Linkes." App. E, 202; TR 2132, line 8. Later, counsel for FDIC explained, again, the whole purpose of the inquiry was to "help us find it if it were, but —" (App. E, 209; TR 2139, line 23), and the Court reiterated about item No. 294, that, "I guess we are getting a location for that." App. E, 210; TR 2140, line 13. The examination continued until the Court asked, "Does that do it, Mr. Bowles?" App. E, 217; TR 2148, line 14), and Mr. Bowles stated that it was "a good place to stop [asking about location of items not claimed by Petitioner and not at issue!]" App. E, 218; TR 2149, line 5.

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[3]Petitioner believed that some items from the auction had been given to her by her husband, Mr. C. A. Smith, President of Westgate. When she learned, during trial, that Westgate had paid for all items, she withdrew her claim to any of them (TR 2082).

This testimony took place on August 21, 1975, but Ex. JJJ was not offered in evidence that day. It came in as part of a clean up motion after trial resumed on Monday, February 23, 1976 (TR. 2794).

When the trial finished that week on Saturday, February 28 at 6 p.m., the Magistrate acknowledged that Ex. JJJ, like a host of other attorney-prepared booklets was admitted solely to aid in argument (TR at 3877, line 25). The Court explained that these documents "that were introduced this afternoon and earlier in the week as essentially the work product of the attorneys [aid the Court's] understanding of [other] documents in evidence." TR 3901, line 20-3902, line 3.

It is inconceivable that anyone could point to specific testimony or evidence in the record (clerk or reporter) to justify the Court of Appeals' conclusion that the "issues were expanded." Further, since the Court of Appeals had not called up the exhibits it has not had the benefit of following the testimony referenced with Exhibits GGG (the auction catalog) and JJJ (the copies of pages from GGG, thought by FDIC attorneys to show missing items).

B. Any Suggestion Petitioner Had Converted the Alleged Missing Items Was Objected to and Sustained.

The Court of Appeals incorrectly said, "It is clear, however, that much testimony and documentary evidence respecting the missing items was received *without objection*." App. C, 114.

But the record shows that when Mr. Bowles had started to ask Petitioner the location of items alleged by him to be missing, immediately the following dialogue occurred:

> Mr. Engstrand: "Why can't we talk about the ones she claims instead of the ones she doesn't claim?"
>
> The Court: "Well, that's what I am trying to do, Mr. Engstrand."
>
> Mr. Engstrand: "In view of the time problems involved, I object to putting before the court the items that are not claimed until there's some offer of proof as to relevance."
>
> . . . .
>
> "I'll stipulate to whatever you say they've bought and is not around. Then if you want to try to infer that Mrs. Smith has stolen them, then we'll take it up at an appropriate time."
>
> The Court: "I go along with that. Let's talk about the items that *are* claimed [by Petitioner] and are lost [not the ones *not* claimed by Petitioner and lost]."

App. E, 132; TR 2055-57.

The examination of Petitioner about Ex. JJJ was then commenced after a recess in a most jocular vein. "I [Mr. Bowles] tried to make a deal with him [Mr. Engstrand] to give us part of it [what might be found through examining Petitioner] if we could locate any of them, but he [Mr. Engstrand] wouldn't do *that* [but he would permit questions to help locate], because it could be done 'quickly'." App. E, 182; TR 2109, lines 20-26.

Thus, both the Court and Petitioner's counsel considered Mr. Bowles' examination irrelevant. It was permitted as a favor to seek Petitioner's aid in locating or identifying the attorney-alleged missing items. The objection was never withdrawn.

III
THIS CASE CALLS FOR THE SUPERVISION OF THIS COURT.

The Magistrate's ROF was filed on Thursday, April 15, 1976. No one had an opportunity to object to the Magistrate about the ROF. A hearing was held before the District Court on Friday, April 30, 1976 (TR XLVI, 1053-1126), and a memorandum opinion approving the Magistrate's recommendations was filed on May 7, 1976 (App. B). Petitioner filed a 42-page objection on April 28 (CT 787) and a 154-page supplement on May 5, 1976 (CT 907). Thus, the District Court read, digested, and rejected all of Petitioner's objections within nine days, including a weekend.

The District Court not only took the "clearly erroneous" standard of review (App. B, 104), but, ignoring any evidence or lack thereof, said of the ROF:

> Clearly, Magistrate McCue's effort in analyzing the complex issues in this csae, synthesizing the evidence adduced, and reaching the reasoned findings and conclusions submitted to this court was Herculean in concept and he has, in my judgment, discharged his responsibility in an exemplary fashion, both to this court and as contemplated by the mandate of the Magistrates Act.

App. B, 105.

The Court of Appeals' review was just as cursory. Its opinion (App. C) of slightly more than 9 pages does not cite any of the dozens of cases, statutes, and treatises the parties grappled with in briefing.[4]

[4]Petitioner filed mechanic lien foreclosure suits against the hotel properties for nearly one million dollars and additional claims in the Chapter X proceedings of Westgate. The dismissal of the foreclosure suits for failure to prosecute under Local Rule 10 (now Rule 237) is on appeal (Ninth Circuit Docket Nos. 77-2560, 2561, 2620, 2684, 2685, 2686), and a summary judgment (based solely on the ROF) granting subordination of all of Petitioner's money claims (overuling a Bankruptcy Judge's denial) is also (Ninth Circuit Docket No. 78-2603).

IV
CONCLUSION.

There is injustice and unfairness here but that is not the point. The point is that the ROF is a shameful and obfuscatory excuse for proper Rule 52(a) findings and conclusions; a judgment for substantial money has been entered without notice, hearing, or deliberation; and, the Court of Appeals has condoned all of it.

It is believed that finding "the facts specially" and stating "conclusions of law" separately according to Rule 52(a) is as important for trial courts as the proper interpretation of Rule 10b-5 is in "the administration of the federal securities laws." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 471 (1977). Here, as there, the petition for certiorari should be granted.

Respectfully submitted,

JENNINGS, ENGSTRAND & HENRIKSON,
A Professional Law Corporation,

By PAUL D. ENGSTRAND and
GEORGE J. BERGER,

Attorneys for Petitioner.

APPENDIX A.

Recommendation on Findings.

United States District Court, Southern District of California.

Federal Deposit Insurance Corporation as Receiver of United States National Bank, Plaintiff, vs. Westgate Plaza, a California corporation, et al., Defendants. No. 74-50-E.

California Little America Co., a corporation, et al., Plaintiffs, vs. Helen Smith, Defendants. No. 74-576-E.

Helen Smith, Counter-Claimant, vs. Paul Andrew, as Receiver in Action No. 74-50; (Curvin Trone and Herbert Kunzel, as Trustees of Westgate-California Corporation) and Federal Deposit Insurance Corporation, and California Little America Co., Counter Defendants.

Filed: Apr 15, 1976.

[603]

Pursuant to the Court's orders of reference in the above-captioned matters. U. S. Magistrate Harry R. McCue conducted extensive evidentiary hearings in the manner prescribed by Rule 43 of the Federal Rules of Civil Procedure.

After hearing the evidence, that was fully and ably presented by each of the parties, evaluating the written and oral arguments, and being fully advised, Magistrate McCue has made and filed with the court his Findings of Fact and Conclusions of Law. A copy is attached hereto.

Pursuant to the directions in the court's orders of reference, Magistrate McCue hereby recommends that

the court adopt his findings under the authority of 28 USC 636, Rules 52 and 53(e)(2)(4) of the Federal Rules of Civil Procedure. The Magistrate further recommends that judgement be entered accordingly.

Objections to the Magistrate's findings, if any, shall be in writing and filed within 10 (10) days of April 15, 1976. A hearing on the written objections is scheduled on April 27, 1976, at 10:30 A.M., before the Honorable William Enright, United States District Court Judge.

Respectfully submitted this 15th day of April, 1976.

/s/ Harry R. McCue
HARRY R. McCUE
United States Magistrate

Enclosure
Findings of Fact and
Conclusions of Law

Copy to:
All Counsel

[604]

Consolidated Civil Actions, Findings of Fact and Conclusions of Law.

United States District Court, Southern District of California.

Federal Deposit Insurance Corporation as Receiver of United States National Bank, Plaintiff, vs. Westgate Plaza, a California corporation, et al., Defendants. No. 74-50-E.

California Little America Company, a corporation, et al., Plaintiffs, vs. Helen Smith, Defendant, No. 74-576-E.

Helen Smith, Counter-Claimant, vs. Paul Andrew, as Receiver in Action No. 74-50; (Curvin Trone and Herbert Kunzel, as Trustees of Westgate-California Corporation), and Federal Deposit Insurance Corporation, and California Little America Company, Counter-Defendants.

Filed: Apr 15, 1976.

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[607 Blank]

TABLE OF IDENTITIES

Helen Smith	Mrs. C. A. Smith since July, 1968
Helen Hill	Mrs. C. A. Smith's name prior to July, 1968
Helen Alvarez	Mrs. Smith's name prior to her marriage to John Hill
Helen Harmon	Mrs. Smith's name prior to her marriage to Mr. Alvarez
C. Arnholt Smith	Husband of Helen Smith and formerly Chief Executive Officer, Director and major shareholder of the Westgate California Corporation; formerly Chief Executive Officer of the United States National Bank
Philip A. Toft	Former President of Westgate California Corporation
Paul Andrew	Court-appointed Receiver for the Westgate Plaza Hotel. Date of confirmation—February 13, 1974
Curvin Trone and Herbert Kunzel	Trustees in bankruptcy for Westgate California Corporation
Earl Holding	President, California Little America Corporation, Inc.
Westgate California Corporation (Westgate)	A publicly held Nevada Corporation that functioned as a holding company for its wholly owned subsidiaries
Westgate Plaza Hotel (WPH)	The principal asset of the wholly owned Westgate subsidiary, Westgate Plaza (Westgate Hotel Management Corporation)
Westgate Executive Hotel (WEH)	The principal asset of the wholly owned Westgate subsidiary, Westgate Executive House
Cuyamaca Club	The principal asset of the wholly owned Westgate subsidiary Cuyamaca Management Corporation
Westgate Hotel Services	The wholly owned Westgate subsidiary that supplied goods and services to Westgate Hotels and other subsidiaries
Webster Hotel Services, Inc.	The corporation that succeeded Westgate Hotel Services

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[609 Blank]

TABLE OF IDENTITIES (CONT'D)

International Interior Designs (IID)	The fictitious name used by Helen Hill to conduct business with Westgate and other Smith-entities
United States National Bank (USNB)	Bank controlled by C. A. Smith
Smith-entities	Those corporations and institutions controlled by C. Arnholt Smith, including Westgate California Corp., U. S. National Bank, Sovereign States Capital, Inc., Westgate Hotel Services, Inc. etc.
California Little America Co.	The name of the privately held corporation that now owns the former Westgate Plaza Hotel
Little America Westgate Hotel	The name of the former Westgate Plaza Hotel
Securities and Exchange Commission (SEC)	Government regulatory agency and overseer of publicly held corporations
Federal Deposit Insurance Corporation (FDIC)	Receiver for the United States National Bank and holder of Westgate's notes to the USNB
Commissary and/or Commissary Warehouse	The building that served as a bakery and warehouse for Westgate Hotel Services and later Webster Hotel Services
G. Street Warehouse (Bank warehouse)	The warehouse that was owned and under the control of the USNB
Sub-basement	The Westgate-owned storage area beneath the bank annex building immediately adjoining the USNB
Annex building	The building annexed to USNB building alongside WEH on First Street
Doheny Plaza Condominium	Mrs. Smith's apartment in Los Angeles
Valley Lane Farms	The residence of Mr. C. A. Smith's daughter, Carol Shannon Smith
HSP	Initials meaning Helen Smith Personal

[610]

TABLE OF SIGNIFICANT EVENTS

1.	Helen Hill first met Mr. C. A. Smith	Summer of 1964 in San Francisco
2.	Helen Hill created Helen Hill dba International Interior Designs (IID)	Early 1967
3.	Helen Hill contracted with C. A. Smith to provide personal services to Westgate California Corporation	April 17, 1967
4.	First IID invoice submitted for payment by Helen Hill to USNB	May 26, 1967
5.	First IID invoice submitted for payment by Helen Hill to Westgate	July 21, 1967
6.	Helen Hill married C. A. Smith	July 21, 1968
7.	Opening date of Westgate Executive Hotel	May, 1969
8.	Opening date of Westgate Plaza Hotel	August 30, 1970
9.	C. A. Smith reaffirmed contract with Helen Smith and included USNB	July 12, 1971
10.	Suite 1900/1901 of Westgate Plaza Hotel occupied by Mr. & Mrs. Smith	July, 1972
11.	U. S. National Bank failed	October 18, 1973
12.	C. A. Smith resigned from all positions in the Westgate California Corporation	November 2, 1973
13.	Helen Smith and Martin Rubin signed lease for Apartment 1900/1901	On or after October 30, 1973
14.	Receiver appointed by the court for Westgate Plaza Hotel	February 19, 1974
15.	Westgate California Corporation obtained protection under the bankruptcy laws	February 26, 1974
16.	Sale of Westgate Plaza Hotel to California Little America Corporation	July 1, 1974
17.	Mr. and Mrs. Smith vacated Apartment 1900/1901 at the court's direction and removed their personal property	December 15, 1975

[611]

[612 Blank]

INTRODUCTION

Civil Case No. 74-50E commenced on the 19th day of February, 1974. Paul Andrews was appointed Receiver for Westgate Plaza Hotel in proceedings brought by the Federal Deposit Insurance Corporation (FDIC) to foreclose the Westgate Hotel properties. Westgate's defaults under a note secured by a deed of trust prompted this action. An Order to Show Cause why a judicial determination should not be made of the ownership claims made for property located on the Westgate premises by Mrs. C. Arnholt Smith and Mr. Ambrose Li was issued by Judge Nielsen. The case was transferred to Judge Enright, who ordered that such a determination be made. Due to the complexity and the time consuming nature of the proof that was to be presented, the entire matter was referred to Harry R. McCue, United States Magistrate, with the consent of the parties, for the purpose of hearing evidence and making findings of fact and conclusions of law.

Civil Case No. 74-576E commenced on December 10, 1974, by an original action for unlawful detainer respecting Apartment 1900/1901 in the Westgate Plaza Hotel, filed by California Little America Corporation against Helen Smith. Helen Smith cross-complained against Paul Andrews, Receiver and Trustees in Bankruptcy for the Westgate California Corporation. This matter was assigned to Judge Enright. Because of common evidentiary matters with Case No. 74-50E, the hearing of the evidence was referred, with the consent of the parties, to Magistrate McCue for consolidation with the hearing in that case.

A total of 34 trial days was consumed by the court

[613]

in the hearing of evidence. Approximately 200 exhibits, consisting of thousands of pages and hundreds of photographs, have been received into evidence. Twenty-two witnesses were called to testify. In addition, the court viewed the premises and inspected hundreds of the items in contention.

Based upon a consideration of all of the evidence, the court makes findings as outlined below. [614]

[615 Blank]

CLAIMS BY AMBROSE LI

With respect to the claims of Mr. Ambrose Li, the court finds that his claims are valid (Li Exhibits 1 through 8). The court credits Mr. Li's testimony and believes his version of the business relationship between himself and Helen Smith. Mr. Li provided objects of art to Mrs. Smith on consignment. Mrs. Smith, because of her special relationship with the Westgate Plaza Hotel, was able to display Mr. Li's items in the display cabinets located in the hotel for the purposes of sale to any person who was interested in buying them. Westgate Plaza Hotel personnel handled the sales transactions and gave the money to Mrs. Smith. Mrs. Smith would then pay Ambrose Li, keeping the difference between Ambrose Li's price to her and the selling price to the customer as her personal profit. Westgate Plaza Hotel received nothing.

Ambrose Li acted in good faith, trusted Helen Smith, consigned his goods to her, and is entitled to the return of the goods. Helen Smith is no longer able to use the Westgate Plaza Hotel as a display and sales area for her business dealings with Mr. Li. Ambrose Li prevails on his claims, and the FDIC and

Trustees are directed to return those items forthwith to Ambrose Li. [616]

[617 Blank]

RESUME OF THE WESTGATE-HELEN HILL RELATIONSHIP

The Westgate California Corporation is a publicly owned corporation that was initially created by Mr. C. A. Smith. As the various activities of the corporation increased, the Westgate California Corporation became the parent corporation to numerous wholly owned subsidiary corporations. A simplified organization diagram defining the corporate relationships is shown on Exhibit 59. Mr. C. Arnholt Smith had been the driving force behind the Westgate California Corporation from the beginning right up to November 2, 1973, the date of his resignation under pressure from the Securities and Exchange Commission (See Exhibit N). At the time of his resignation, C. A. Smith was married to the former Helen Hill, the claimant in this action.

In 1964, Mr. C. Arnholt Smith met Helen Hill while both were attending a convention in San Francisco. At that time one of the topics of conversation between the two was the need for, and the feasibility of, building a first-class hotel located in downtown San Diego. The idea took root, and the Westgate California Corporation, one of the enterprises headed by Mr. C. A. Smith, undertook a program to build, not one, but two hotels in downtown San Diego on the property adjacent to the high rise United States National Bank Building. Mr. C. A. Smith was also the president and chief executive officer of the U. S. National Bank, and he had in 1963 supervised the building of the 25-story tall U. S. National Bank Building in San Diego, California.

This 1964 meeting led to further discussions between Helen Hill and C. A. Smith. In 1967, Helen Hill and Mr. C. A. Smith entered into an agreement concerning the [618]

furnishings and decorating services for two new Westgate hotels (See Exhibit 1). The agreement is dated April 17, 1967. Helen Hill was to serve as Westgate California Corporation's interior decorator and to provide the furnishings and fixtures for both hotels and buildings owned or planned by Westgate in downtown San Diego and elsewhere. To carry out the agreement, Helen Hill did business under the fictitious name of International Interior Designs (IID). She immediately set about acquiring items to sell to the Westgate California Corporation and its wholly owned subsidiary corporations, as well as other Smith-controlled entities. IID was created in 1967, and its first invoice was submitted to Westgate in July of 1967.

In July of 1968, Helen Hill married C. Arnholt Smith and acquired a new identity, "Mrs. Helen Smith". Mrs. Smith continued to acquire furniture, fixtures, and objects-of-art and to sell them to Westgate California Corporation and its wholly owned subsidiaries through IID.

The first hotel, the Westgate Executive Hotel, was opened in May, 1969. Mrs. Smith continued to devote her full efforts to Westgate, and IID continued to acquire and sell furnishings to Westgate California Corporation. In addition, the Cuyamaca Club, another of Westgate's wholly owned subsidiaries, was relocated to the new Westgate Executive Hotel building, and Mrs. Smith participated in this move.

The second hotel, the Westgate Plaza, was opened August 30, 1970. Mrs. Smith continued to devote her full efforts to Westgate to acquire and sell furnishings and fixtures to the Westgate Plaza Hotel and other Westgate entities. The nineteenth floor of the Westgate Plaza Hotel was incomplete on the date the hotel opened. The four luxury [619]

suites on this floor were completed and furnished thereafter. The Presidential Suite (1900/1901) was completed by July, 1972. Mrs. Smith and Mr. Smith exercised exclusive dominion and control over this suite since that time. Mrs. Smith acquired the furnishings and supervised the installation and decoration of each of the luxury suites (1900/1901, 1902, 1903, 1904), as well as all other suites and the public areas of the Westgate Plaza Hotel.

In 1973, the S.E.C. filed a complaint against Westgate California Corporation petitioning the court to appoint a Receiver. A consent judgment was filed, and on November 2, 1973, Mr. C. A. Smith resigned as chief executive officer, pursuant to the judgment. During the same period, the United States National Bank (USNB) was closed by the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (FDIC) took over as Receiver for the USNB on October 19, 1973.

During this period of time, on October 23, 1973, Mr. C. A. Smith ordered a lease agreement in favor of Mrs. Smith prepared for the Presidential Suite (1900/1901). The lease was executed on or after October 30, 1973. The document that purports to be an arms length lease agreement for the suite (unfurnished) was signed by Mr. Rubin, President of the Westgate Plaza

Hotel, and Mrs. Smith. The consideration recited was $60,000.00 for a two-year term. The agreement bears the date of October 15, 1973 (See Exhibit 3).

The Westgate California Corporation went into bankruptcy on February 26, 1974. The Trustees in bankruptcy for Westgate California Corporation and the FDIC, as Receiver for the USNB and holder of Westgate notes, attempted to marshal assets and stem the financial hemorrhages that threatened the existence of Westgate as a viable enterprise. It was decided to [620]
liquidate the Westgate Plaza Hotel. On July 1, 1974, the Westgate Plaza Hotel was sold to the California Little America Corporation.

THE DISPUTE

Mr. and Mrs. Smith have continued to exercise exclusive dominion and control over the Presidential Suite (1900/1901) under the color of a lease, even though only $1,250.00 in rent was ever paid in cash or otherwise tendered to the Westgate Plaza Hotel. In addition, Mrs. Smith claims that numerous items of furniture, fixtures, and works-of-art that are in the hotels and various storage areas are her personal property or property of Helen Hill, dba "International Interior Designs" and were not the property of Westgate California Corporation or any of its subsidiary corporations on July 1, 1974, and thus could not have been sold to the California Little America Corporation or lawfully claimed by the Westgate Trustees. She demands that these items be returned to her. The Trustees for Westgate California Corporation and the FDIC, as Receiver for the USNB, deny Mrs. Smith's claims, and in addition demand that she vacate the Presidential Suite (1900/

1901), as well as other Westgate storage areas she, in fact, controls and demands the fair rental value for her use of these premises. Mrs. Smith further claims that the Trustees and Receiver acted unlawfully in preventing her removal from the Westgate premises the furniture and other items she claims as her property.

The foregoing resume briefly outlines the background of the disputes presently before this court for resolution.
[621]
[622 Blank]

THE SUITE LEASE FOR APARTMENT 1900/1901—WESTGATE PLAZA HOTEL

It is undisputed that Mr. and Mrs. C. A. Smith have exercised exclusive dominion and control over the Presidential suite of the Westgate Plaza Hotel (Apartment 1900/1901) from the time of its completion in mid-1972 until December 15, 1975.

It is clear that Mr. and Mrs. Smith exercised this dominion and control over Apartment 1900/1901 and its contents without the benefit of a lease or other formal agreement with the Westgate Plaza Hotel until October, 1973.

During 1973, it became obvious that the Smiths' financial fortunes were changing. The Securities Exchange Commission had filed a civil complaint against California Corporation, with the result that Mr. C.A. Smith was being forced to resign as Chief Executive Officer of Westgate California Corporation (See Exhibit N). In addition, the United States National Bank also headed by C. A. Smith was closed by the Comptroller of the Currency, and it ceased to exist as a viable institution on October 18, 1973.

It was during this hectic period that Mr. Smith became concerned over his and Mrs. Smith's continuing right to exercise exclusive dominion and control over the Presidential Suite and its contents.

Mr. Jim Bucher testified to the circumstances of the initiation of the lease for Apartment 1900/1901 (See Vol XV, Transcript Pages 1888-1986). On October 23, 1973, Mr. Smith called Mr. Jim Bucher, the manager of Westgate properties and employed by Westgate California Realty, and directed Mr. Bucher to prepare a lease in favor of Helen Smith for Suite 1900/1901. He directed that the rental be monthly payments of $100.00. Mr. Bucher said, "Yes, sir. I'll take care of it," to Mr. Smith at that time, apparently out of [623]

habit.

Mr. Bucher then had second thoughts. Because of the bank failure, the SEC investigation of Westgate California Corporation, the common knowledge that Mr. Smith would soon be resigning, and that Mr. Kunzel would be taking over as head of the Westgate California Corporation, he sought out Westgate attorney, Bill Dysart, and asked his advice. The attorney advised Mr. Bucher not to prepare the lease according to the terms dictated by Mr. Smith. Mr. Bucher took the lease problem to top management. Mr. Norm Foster, a vice president, indicated that he would prevail on Mr. Toft, the president of Westgate California Corporation, to prevail on Mr. Smith to change the terms of the lease.

Later that day, Mr. Foster called Mr. Bucher and said, "Here are the new terms of the lease." The new terms called for a two year rental period with

a three year renewal option, at a rental of $2,500.00 a month, and deleting any reference to the square footage of the apartment, and to state that the apartment was unfurnished. Mr. Bucher then prepared a lease which was radically different from leases previously prepared for the other suites on the 19th floor of the Westgate Plaza Hotel.

The lease was sent up to the 25th floor (the 25th floor of the USNB contained the executive offices of Mr. C. A. Smith) on October 24, 1973.

Mr. C. A. Smith called Mr. Bucher on the 30th of October and advised Mr. Bucher that his attorney had changed a few things in the lease; that Mrs. Smith had signed the lease, and that he was sending it down to Mr. Bucher to sign. Mr. Bucher informed Mr. Smith that he would not sign the lease, because he was not an officer of the Westgate Plaza Hotel. Mr. Smith then asked who the officers of the [624] Westgate Plaza were. Mr. Bucher indicated that Martin Rubin was an officer. Mr. Bucher did not sign the lease and first saw the actual lease executed by Mr. Rubin and Helen Smith in February of 1974.

In the executed lease (See Exhibit 3), the leased premises are described as Apartment 1900, unfurnished, for a total consideration of $60,000.00 at a rental rate of $2,500.00 per month in advance for a two year term with an option to renew. The parties to the lease are the Westgate Plaza Hotel—Lessor and Helen Smith—Lessee.

In addition, the lease, despite the initial characterization of the premises as "unfurnished," recited that all of the furnishings and fixtures, such as carpets, rugs, and built-in marble fire places, etc., were Helen

Smith's personal property, and that she had the unrestricted right to remove them. It provides as follows:

> "Upon termination of the lease the LESSEE shall at her own expense remove all furniture, carpeting, drapes, dishes, silverware, pictures, tapestries, works of art, and other furnishings, including the two marble fire places and all built in improvements, fixtures, and appurtenances which are her personal property, and which are and shall remain free of any claim by or from the LESSOR and any other person or entity." (Excerpted from Paragraph 2, Exhibit 3).

Mr. Bucher testified that this recital was not in the lease he prepared (Transcript, pages 1910, 1911). The term of the lease was defined as beginning on October 15, 1973, and ending on October 15, 1975.

Mrs. Smith testified that she executed the lease at Mr. Smith's request, for herself, Helen Smith. Mr. Martin Rubin, the manager of the Westgate Plaza Hotel executed the lease for the Westgate Plaza Hotel (See Exhibit 3). The date on which the lease was actually signed is uncertain, but it was on or after October 30, 1973. The initial [625]

$1,250.00 rental payment for the period October 15-November 1, 1973 was paid. Thereafter, no cash rental payments in advance as required by lease or otherwise, were paid or credited for the use of Apartment 1900/1901.

Mrs. Smith testified concerning her apparent failure to pay further rent. She said that she and Mr. Philip Toft had orally discussed the terms of the suite rental prior to her signing the lease. She testified that Mr. Toft wanted her to pay the rent every month by

check, and then Westgate would give her a check in the same amount to pay her for items that she had sold to the hotel. The reason given by Toft for this arrangement, according to Mrs. Smith, was that it would be better bookkeeping procedure. There is no evidence that this "understanding" was ever agreed to in writing or reduced to precise terms defining crediting and debiting procedures, or incorporated into the lease agreement, or implemented in fact. Mr. Philip Toft, former president of Westgate California Corporation, in his deposition that has been admitted into evidence, testified concerning the facts and circumstances leading up to the lease agreement and the agreement concerning the rental of Apartment 1900/1901 to Helen Smith. He indicated that he had discussed the change in the lease rental rate from $100.00 to $2,500 dollars per month with Mr. Smith. He said that the rental rate change to $2,500.00 per month was made with the expectation that the hotel would be paid in cash by Mrs. Smith. Toft testified, "I mean cash as opposed to an offset, because I would prefer if she paid me $2,500.00 in cash and to give her a check for $2,500.00 on her bill." (Toft's Deposition, Page 33, Line 23-25).

The books of the Westgate Plaza Hotel reflect no such transactions, nor do the books of IID or the personal books [626]

of Helen Smith.

The books of the Westgate Plaza Hotel show that Mrs. Smith was in arrears on her rental obligations for the Presidential Suite (1900/1901). Further, there is no evidence or testimony whatsoever that after the first payment of $1,250.00, she ever paid cash rent

or tendered monthly checks for rent to the Westgate Plaza Hotel. In short, Mrs. Smith not only failed to pay the cash rent per the lease, but she also failed to tender or submit her check as the condition precedent to receiving payment or "set off" for items sold to the Westgate Plaza Hotel by IID. She failed to record in the IID books the value received from Westgate to reduce its debt to her, per the unorthodox oral bargain struck with Mr. Philip Toft prior to Mrs. Smith signing the written lease. It must be further noted that the $1,250.00 cash rental payment for the initial 15 day period of the lease was not off-set by either a Westgate check to Mrs. Smith or a reduction of Westgate's debt to IID. This action at the point in time closest to the alleged oral bargain and execution of the lease is inconsistent with the oral bargain and consistent with the terms of the lease calling for rental payments in cash.

In evaluating the oral testimony of Mr. Toft and Mrs. Smith, the court has had the opportunity to observe the demeanor of Mrs. Smith and to study the uncertain and slippery responses of Mr. Toft in his deposition. Mr. Toft has been convicted of felony offenses involving crimes of moral turpitude. This court, after allowing such testimony to come into evidence to contradict the terms of a written lease agreement, must avail itself of the wisdom of the ages to properly weigh such evidence. The wisdom underlying the statute of frauds and the parole evidence rule was well [627] summarized in the year 1604 in the Countess of Rutland's Case, 17 Eng. Rep. 89.90;

> "It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement

> of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matters in writing should be admitted."

These words written so long ago are applicable to such disputes as the one before the court. The "nude averments" have been made by Mr. Toft and Mrs. Smith to contradict the written words of the lease. That these nude averments are based upon "slippery memory" there can be no doubt. (See Toft's Deposition, Page 32, Lines 26, 27, 28, 65 through 71, 174 and 175)

Based upon the totality of the evidence before the court in the matter of the alleged oral agreement, the court is compelled to disbelieve Mr. Toft's and Mrs. Smith's version of events leading up to the formal execution of the written lease agreement and gives no weight to their oral testimony on this matter.

From all of the evidence, the court finds that there was no oral agreement concerning rent as alleged by Mrs. Smith. The court further finds, assuming there was an oral agreement, that it was made prior to the execution of the lease; it was not implemented or honored by either party; it was superseded by the lease agreement (See Exhibit 3); and that it was not a subsequent, executed oral modification of the terms of a pre-existing written lease.

The lease describes the premises as "unfurnished." It is undisputed that Apartment 1900/1901 was completely furnished in October of 1973. The furnishings included two built-in marble fireplaces, and the many other items that were [628]

described in the lease agreement as property of Helen Smith and not the Westgate Plaza Hotel. Uncontroverted evidence shows that the characterization of the apartment as "unfurnished" (meaning no Lessor owned furnishings on premises) is totally false. The evidence further shows that the blanket ownership designation which purported to give Helen Smith authority to "strip the apartment" is equally false, and that each of the specific indentifiable items such as the marble fireplaces, as well as the majority of others described as belonging to Helen Smith, were in fact the property of the Westgate Plaza Hotel, many having been purchased at the Jean Owings auction.

The use of the word "unfurnished" was a deliberate choice, and not just an oversight or scrivener's error. Mr. Toft, in his deposition, explained the use of the word "unfurnished." (Toft's Deposition, Page 28). It was used to justify the $2,500.00 per month rent for the Presidential Suite of the Westgate Plaza Hotel, which he knew was elaborately furnished and decorated as he had been inside the apartment. He must have known that it was worth far more than $2,500.00 per month. He had been involved in the lease discussions soon after Bucher's refusal to draft the lease (See Toft's Deposition, Page 26).

The terms of the lease pertaining to Helen Smith's right to removal of *all* of the furnishings, all built-in improvements, etc., and the two major built-in fixtures (thus rendering the apartment truly unfurnished, and uninhabitable) must be considered nothing less than a deliberate attempt to convey to Mrs. Smith all of the items of furniture, furnishings and fixtures that were present in the apartment immediately prior to the lease being signed. The true [629]

purpose of the recital of ownership was to create the belief that all such items were Helen Smith's personal property, when in truth and fact Mr. and Mrs. Smith each knew or should have known that the great majority of the furnishings and fixtures in Apartment 1900/1901 had been bought and paid for by Westgate.

It is clear to this court that this "lease" is the product of C. A. Smith's efforts to maintain for himself and his wife, Helen Smith, continuing exclusive custody and control over Apartment 1900/1901 and its contents for their own personal benefit. Mr. and Mrs. Smith knew that Mr. Smith was being compelled to resign all positions of authority in Westgate on November 2, 1973, and that he would no longer be able to impose his will as the chief executive officer of Westgate to allocate himself and Mrs. Smith the rent-free use of Apartment 1900/1901.

In light of the above, the purported "lease agreement" must be found to be nothing more than a document in legal form that recites false and intentionally misleading information, and that each of the "real" parties knew the recitals to be false when made, and the recitations were calculated to deceive and mislead third parties. Equity cannot countenance such a document, and this court finds that it is not a valid lease.

It is also interesting to note that the lease agreement for Apartment 1900/1901 prepared at the direction of C. A. Smith and Philip A. Toft was not in fact signed by either of them in behalf of Westgate. This marks a significant change in the pattern of contracting activities that were conducted in prior legal commitments between Helen Smith and Westgate. Every significant formal contract between Helen Smith and Westgate prior to this one was [630]

executed on behalf of Westgate by either C. A. Smith or P. A. Toft (See Letter of Agreements, the purported leases for the sub-basement and the G. Street locker).

The court finds, after examining Exhibit N (Westgate California Corporation's minutes of directors meetings) that the relationship between Smith, Toft, and the board had undergone radical changes in 1973 (See Exhibit N). The board, as it was constituted in October of 1973, contained directors appointed, with the approval of Judge Nielsen, pursuant to attempts to resolve and settle the law suit filed by the S.E.C. It was a further condition of the S.E.C. settlement agreement that C. A. Smith and P. A. Toft would relinquish their positions as officers and directors of Westgate California Corporation. Smith and Toft, the architects of the lease agreement, had in fact agreed to resign all positions of authority. In October, 1973 they were in no position to execute contracts on behalf of Westgate, and particularly not with Mrs. Smith.

Mr. Smith found out who the officers of Westgate Plaza were only after unsuccessfully directing Mr. Bucher to sign the lease (this is an indication of Mr. Smith's lack of knowledge and concern over the legal formalities of intercorporate relationships). He contacted Mr. Rubin, who apparently followed Mr. Smith's direction to sign the lease on behalf of the Westgate Plaza Hotel. There is no evidence that Mr. Rubin had any knowledge of any "oral understanding" with Mrs. Smith that she was not going to pay cash rent in advance. The first payment of $1,250.00 was in fact paid by Mr. Smith. There is ample evidence to show that Mr. Rubin was greatly concerned about improving the "cash flow" from Apartment 1900/1901. [631]

The court finds that Mr. Rubin was "duped" into signing the lease on behalf of the Westgate Plaza Hotel by Mr. C. A. Smith, and further that Mrs. Smith had no intention of paying rent to the Westgate Plaza Hotel for the use of Apartment 1900/1901.

The conduct on the part of C. A. Smith, P. A. Toft, and Helen Smith in misleading Mr. Rubin and all others, falls squarely within the prohibitions of California Civil Code, Section 1550(2) and 1572, thus rendering the purported lease agreement void from the outset.

In addition to the above, the court finds that Mr. C. A. Smith, chairman of the board of directors of Westgate had a financial interest in the purported lease agreement for Apartment 1900/1901. The evidence shows that the second floor of the apartment was used exclusively by him as a private office that contained a locked vault room with a large safe and filing cabinets. The only person who ever held the key to the vault room was C. A. Smith, and he had exclusive control over that vault room until December 15, 1975. Mr. Smith had equal access to the entire Apartment 1900/1901 with Helen Smith, thus Mr. Smith had a significant financial interest in the lease agreement.

The evidence shows that he did not disclose his role in preparing the lease agreement and having it executed in favor of his wife to the board of directors of Westgate California Corporation or to any other director's committee or to the shareholders. Under such circumstances, the California Corporation Code, Section 820, provides that such a contract is either void or voidable. Westgate has the option to void the lease

agreement, if the contract is unreasonable. The court finds that the lease agreement is unreasonable, [632] because it recites false information (as discussed above); it was a product of the efforts of the chairman of the board to obtain for himself and his wife financial gain at the expense of the corporation while at the same time depriving the corporation of an opportunity to utilize one of its most costly assets to generate badly needed cash.

The court therefore finds that the lease agreement is void under the provisions of Section 820 of the California Corporation Code.

Further, the court finds that Mr. Rubin was not authorized by the board of directors to act on Westgate's behalf as required by Westgate's By-Laws, Article V, Section 5, in the matter of entering into contracts with Helen Smith which would bind Westgate California Corporation (See Exhibit N and L). Sadly, the record reflects that the chairman of the board of directors of Westgate did not even know who the officers of Westgate Plaza were.

The court finds that the lease agreement signed by Mr. Rubin is void, because he simply had no authority to commit Westgate California Corporation to such a contract.

Mrs. Smith urges the court to accept her view of the law that it is not the province of the court to inquire into the adequacy of the consideration or the motives behind the written lease agreement, but rather to accept it as valid on its face (except, of course, for the terms of rental payments and the definition of the words "payment in advance"). Mrs. Smith overlooks the fact that the court must be first convinced

that the agreement was made at arms length. Here the court has found that Mr. and Mrs. Smith were jointly benefiting from the use of the apartment prior to the "Lease agreement." Mr. Smith, as chief executive officer,

[633]

may have been entitled to rent-free use of corporate assets as part of a compensation arrangement, but that matter is not for this court to inquire into.

The court has found that Mr. and Mrs. C. A. Smith knew, prior to the execution of the lease, that the Smith's were being removed from all positions of power and control over Westgate and its entities; that Mr. Smith, as a corporate officer of a publicly held corporation, knew that he could not deal for his own or his family's benefit with corporate assets without disclosure and payment; that Helen Smith was the wife of C. A. Smith; that C. A. Smith directed Helen Smith to sign the lease; that Helen Smith complied with his direction, but had no intention to pay cash rental for the apartment as required by the lease, thus depriving Westgate Plaza Hotel of income; and that the lease contained false recitals concerning ownership of corporate assets by Mrs. Smith. To urge the court to overlook and disregard such facts is truly worshipping form over substance and in effect asking the court to ignore its underpinnings in equity. Equity came into existence because the worship of such false idols always leads to injustice.

Just as Mrs. Smith has asked the court to pierce the corporate veil between the various corporate entities, justice requires the court to pierce the "separate property" veil that Mr. and Mrs. Smith have created for

the purpose of perpetuating their control over Westgate assets at no cost to themselves for their personal benefit and to the detriment of Westgate and its successors. In so doing, the court further finds that the lease agreement was not made at arms length and must be set aside as invalid.

Even if the court were to accept the lease as valid, the court finds that rent was not paid, that Mrs. Smith [634]
was in default, that she failed to comply with the notice to quit provisions of the California Civil Code, that her attempt to exercise the renewal option was ineffective, and further that the lease expired on October 15, 1973, and that she had no right thereafter to assert dominion and control over the premises. Therefore, the premises were unlawfully detained by Helen Smith.

Mrs. Smith held herself out to the world as the owner of the "lease" from October 15, 1973, until she was ordered to turn the keys over to the court on December 15, 1975; she therefore is solely responsible for payment of the reasonable rental value of the Presidential Suite (Apartment 1900/1901) for the 26 months she asserted "exclusive" dominion and control over the suite.

There is no evidence before the court to establish "a reasonable rental" value for Apartment 1900/1901 other than the value recited in the "lease." The court must therefore accept the value of $2,500.00 per month, and finds that Helen Smith owes the Westgate California Corporation the sum of $7,500.00, the Receiver the sum of $12,500.00, and the California Little America Corporation the sum of $43,750.00 for a total of

$63,750.00 for the period October 15, 1973 to December 15, 1975.

As to Mrs. Smith's counter-claims against the Receiver and Trustees, the evidence shows that there is simply no basis in fact or in law for such claims, and Mrs. Smith takes nothing thereby. [635]

[636 Blank]

THE MATTER OF SET OFF

Helen Smith's attorney has urged the court to accept his view that Helen Smith's obligations to Westgate must be set off against the monies that Westgate owes her for the materials and services she has rendered, and that set off occurs as a matter of law.

This court has found that Helen Smith was Westgate's agent and as such was a fiduciary. The court must also recognize that the Trustees in Bankruptcy have claimed that Helen Smith has breached her fiduciary duties and profited at the expense of her principal, Westgate California Corporation.

This puts Helen Smith's money claims against Westgate into dispute. The validity of Helen Smith's money claims is not a matter to be decided here. The "set off" of mutual, valid obligations between the Trustees of Westgate and Helen Smith is a matter for the bankruptcy court. [637]

[638 Blank]

THE STORY OF INTERNATIONAL INTERIOR DESIGNS

Mrs. Smith testified to the facts concerning the creation of International Interior Designs and its method of doing business. Mrs. Smith and Hilda Edmunds testified to the internal operation, bookkeeping, account-

ing and its working relationships with Westgate personnel. The testimony of Mrs. Smith and Hilda Edmunds is principally contained in Transcripts Vol. IX and XII.

"International Interior Designs" (IID) came into being in 1967 when Helen Hill, for the purpose of doing business, filed a fictitious name statement in San Diego County. This business identity became the vehicle through which Helen Hill conducted most of her activities with the Westgate California Corporation (Westgate) in the decoration and furnishing of various Westgate buildings.

A set of books was created and capital was acquired. The IID office was located in Helen Hill's office in La Jolla. Mrs. Hilda Edmunds, Helen Hill's long time secretary and bookkeeper, set up and kept the books for IID, as well as Helen Hill's personal books.

IID had no employees as such. Neither Helen Hill nor Hilda Edmunds was shown on the IID books as salaried employees. Mrs. Edmunds was on the Westgate California Corporation (Westgate) payroll at all times since 1968, except for a brief period in 1971, when she appeared on IID's books as a salaried employee.

Helen Hill acquired items to be sold to Westgate and had them delivered directly to the Westgate entities involved. All of the receiving and storage functions were performed by Westgate personnel. [639]

The IID paperwork was handled by Westgate employees. Mrs. Edmunds, and for a period of time a Beverly Fenton, would invoice the Westgate California Corporation for items purchased by Helen Hill for the Westgate account.

It was not unusual for Mrs. Edmunds or other Westgate employees to prepare the IID invoices, after the goods were received and prior to the issuance of Westgate purchase orders. It was not unusual for the Westgate purchase orders to be prepared at the IID office.

All of the IID supporting personnel were employees of Westgate entities. It is clear that a close working relationship existed between the Helen Hill, dba IID, and Westgate Calfornia Corporation.

Helen Hill, later Helen Smith, had, in fact, total authority to act for Westgate to select items for use in the hotels, to order the items delivered to the Westgate storage areas, to designate the actual location of the items in the hotels, to determine the price to be paid by Westgate, to issue the IID invoice, and to direct the preparation of the Westgate purchase order when one did not exist.

All of the personnel involved with Helen Hill Smith were employees of Westgate entities, except for a brief period in 1971, when Hilda Edmunds was transferred to the IID payroll as the result of an audit. The clerical expenses and other typical overhead expenses of IID were paid by Westgate.

In summary then, IID was a business that was completely supported by the Westgate California Corporation. During the period 1968 to the present, all items ordered by IID were stored in Westgate and USNB warehouses and storerooms. [640]

The IID business as it existed and was carried on was truly a minimum risk type of operation. Capital was supplied by Westgate. There was no payroll to meet, no concern for insurance coverage, no worry over escalating costs, and no concern over profitability.

IID had a guaranteed market at a price set by itself. There were no limitations with respect to sources of supply or price to be paid by Westgate, except as to off-the-shelf items that carried a "list price." Helen Hill Smith made all of the selections and all of the decisions for Westgate in the area of interior decorating prior to the resignation of Mr. Smith from the Westgate California Corporation.

IID supplied furnishings acquired from various sources, commercial suppliers, auction houses and even from Helen Hill herself. The only real limitation imposed on IID by Westgate was on the rate of billings and then only at times when the "cash flow" of Westgate was a problem. During those periods Mrs. Smith deferred billings above a certain amount for brief periods and "loaned" items that had not been paid for to Westgate.

IID continued to acquire items and invoice them to Westgate through the entire year of 1973. All items acquired by IID that are being claimed by Mrs. Smith are presently located in areas under the control of the FDIC and/or the Westgate Trustees. Some of these areas, the sub-basement storeroom, the G. Street locker, Apartment 1900/1901, were controlled exclusively by Mrs. Smith up to the point in time that the court took the areas under its supervision for the purpose of taking evidence in this case.

In 1971, C. A. Smith and Helen Smith agreed that Mrs. Smith would do for the USNB what she was doing for Westgate. [641]

During the six-year period that Helen Hill, dba IID, did business with Westgate, she billed a total of 3.616 million dollars for the items supplied to Westgate.

The net profit earned during the six-year period was $870,714.00. This figure includes expenses of Mrs. Smith that were paid for rental for her Doheny Plaza Condominium, as well as $1,000.00 cash a month for miscellaneous expenses. If these are taken into consideration, then her *net profit* realized was in excess of $900,000.00. [642]

[643 Blank]

FURNITURE LITIGATION

The following factual summary is based upon a distillation of the testimony of witnesses called by each of the parties. The principal testimony involved is that of Mrs. Smith, Hilda Edmunds, Ronald Sutter, Saul Messer, and Howard White. The testimony is contained mainly in Transcripts, Vols. VIII through XXI and associated exhibits.

The Westgate Plaza Hotel and the Westgate Executive House, the Cuyamaca Club, the sub-basement storage area, and the G. Street warehouse each contain items that are claimed by Mrs. Helen Smith as her personal property. These claims arise as a result of Mrs. Smith's involvement in decorating the various Westgate properties pursuant to her agreement with Mr. C. A. Smith, the former chief executive officer of the United States National Bank (USNB) and the Westgate California Corporation.

Mrs. Smith began her association with C. A. Smith and the Westgate California Corporation as Helen Hill, and Helen Hill, dba International Interior Designs, and finally as Mrs. C. A. Smith, wife of the chief executive officer and Helen Hill, dba International Interior Designs.

Helen Hill had an oral agreement with Mr. C. A. Smith to provide personal services to Westgate in the area of interior design work for the Westgate properties. This oral understanding was reduced to writing in the "Letter of Agreement" dated April 17, 1967 (See Exhibit 1). A business identity, "International Interior Designs," was created under the fictitious name by Helen Hill for the primary purpose of supplying furniture and fixtures to various Westgate entities. [644]

The "Letter of Agreement" provides that Helen Hill will act as a decorator and supplier of furnishings and fixtures for the Westgate hotels. She was to receive compensation payable "in futuro" in the manner suitable to her when her services were no longer required and the job completed.

While the agreement appears on its face to be one made at "arms length," the parties to the agreement, i.e., C. A. Smith and Helen Hill, were married in July, 1968. Whether the business relationship between Mr. and Mrs. Smith and the entities he controlled remained at arms length thereafter can only be determined by evaluating the actual relationship between the parties as the agreement was implemented and the manner in which business was conducted by them.

The principal dispute among Helen Smith, the Federal Deposit Insurance Company (FDIC) and the Trustees for Westgate California Corporation (Trustees), involves antique furnishings acquired by Mr. and Mrs. Smith for use in the Westgate Plaza Hotel and other Westgate enterprises. The furnishings in dispute are presently located on premises that are or were formerly under the control of Westgate California Corporation and the United States National Bank (USNB).

The Trustees for the Westgate California Corporation and the FDIC, as receiver for the USNB, arranged for the sale of the Westgate Plaza Hotel and all of its property, wherever located, to the California Little American Corporation. The sale was accomplished on July 1, 1974.

The court's first task in resolving this dispute is to determine who held legal and equitable title to the disputed items on the sale date. Thereafter, the right to possession of the individual items is governed by the court's findings [645]

as to Mrs. Smith's rights, if any, and by the Hotel Sales Contract as between the Trustees and FDIC, and among the Trustees, FDIC, and California Little America, Inc.

The items in dispute are unique and generally of high value. These are the class of items that were acquired exclusively by Mr. and Mrs. Smith for use in the Westgate Plaza Hotel common areas and luxury suites on its 19th floor, as well as the Cuyamaca Club and Westgate Executive Hotel. They were acquired for the purpose of re-creating within the Westgate Plaza Hotel the elegance and charm of the eighteenth century world of French aristocracy that has long since ceased to exist. The modern world it seems is more concerned with mass survival rather than the indulgences of the privileged class, and the Westgate Plaza Hotel was intended to provide an oasis of aristocracy in San Diego for the 20th Century traveller.

The task of creating a pseudoreality world of Louis XV, Louis XVI, Marie Antoinette and Madame de Pomadour within the Westgate Plaza Hotel was undertaken by Helen Hill, later Mrs. C. A. Smith, with Mr. Smith's assistance and approval.

This was no small undertaking. It required knowledge of antiques, art, and history. More importantly, it required financial support in depth and ease of access to such financial support.

In 1967, Mr. and Mrs. Smith set about acquiring the items necessary to turn back the clock and recreate the atmosphere of royal conspicuous consumption and self-indulgence that distinguished (and later extinguished) the French aristocracy during the reigns of Louis XV and XVI.

There is no dispute that Mrs. Smith, with Mr. Smith's assistance, was solely responsible for accomplishing this [646]

task, and that she succeeded admirably in marshalling the status symbols of the 18th Century for use within the Westgate Plaza Hotel.

Mrs. Smith re-created the atmosphere of the French aristocracy throughout the Westgate Plaza Hotel by the ingenious and imaginative use and display of unique antique furniture, tapestries, paintings, and works-of-art in the common areas of the hotel, as well as in the guest suites and in the luxury suites on the nineteenth floor.

Because of the unusual nature of the task, most of the purchases by Mrs. Smith, and also by Mr. Smith, were made at auctions, auction houses, art galleries, and from individual collectors, including some from Mrs. Smith's own personal collection.

All of these items required special handling and attention to minimize the risk of damage. As the purchasing program developed, a small group of persons was formed that specialized in handling, storing, and

placing these objects in locations specified by Mrs. Smith. Thsi group consisted principally of Hilda Edmunds, Beverly Fenton, Leona Woods, Jack Donathan, and Robert Kropp (hereinafter referred to as the Westgate-Kropp group). All were Westgate employees and worked at various Westgate sites with unimpeded access among the sites. Mrs. Smith was in fact the leader of this group, and each one responded to her direction or the direction of her secretary and bookkeeper, Hilda Edmunds, who was also carried on the Westgate California Corporation payroll.

The Westgate Plaza Hotel was opened on August 30, 1970, and fully completed in 1972. Westgate California Corporation went into bankruptcy in February 1974, following the collapse of the United States National Bank on October 19, 1973. [647]

The Westgate Plaza Hotel was sold on July 1, 1974, and Mrs. Smith has asserted her claims to recover numerous items that are in the hotel and storage areas that she believes to be rightfully her property.

Since most, if not all, of the items involved in Mrs. Smith's claims are the type of items that are considered assets of a corporation, one would think that it would be a simple exercise in asset tracing and accounting to verify or deny the claims.

Unfortunatley, however, this is not the case. The testimony of Westgate employees and former employees, as well as the books and records of Westgate, clearly reveal a total and complete disregard for the ordinary business requirements to properly identify, record and account for, by description and location, the antique items acquired from Mrs. Smith. There was no credible attempt to maintain a current inventory of antiques

or objects-of-art for the benefit of the Westgate California Corporation or the Westgate Plaza Hotel. There was no attempt made by the Westgate employees charged with the "receiving" function responsibility to permanently identify each item with an asset number or to permanently identify the item with a particular purchase order; nor was there a credible effort on the part of the Comptroller or the accounting office to enforce such a procedure or to maintain a fixed asset inventory for Westgate.

It is impossible for the court to determine with any certainty the purchasing, receiving, asset identification procedures followed by the Westgate-Kropp group in handling items supplied by Mrs. Smith, because there was simply no such formal procedure followed. Consequently, there is no Westgate-fixed asset list in any Westgate-fixed asset ledgers with a description of the individual items acquired, [648]

nor are there any other running inventories or control data in the accounting offices of Westgate. All the court has before it are informal lists prepared by unskilled persons who are less than knowledgeable in the area of the purchasing and fiscal transactions involving the physical items they received, inspected, tagged, re-tagged, marked, stored, and delivered. These lists were made primarily for Mrs. Smith, and they are now being relied upon to serve as the basis for her assertion of legal title. The source of the information on this class of items was, and is, Mrs. Smith herself, the sales slips furnished to her by suppliers, and IID invoices.

The court, after hearing all of the evidence, reviewing all of the documents, inspecting the storage areas,

Apartment 1900/1901, and common areas, and all of the items involved, finds that Mrs. Smith's interior decorating and furnishing efforts can be divided into two significantly different classes of activities and plans:

1. The first class of activities involved creating a utilitarian and functional furnishing plan for the major block of guest rooms on the third through eighteenth floor of the hotel. The purchasing requirements to accomplish this plan were satisfied by conventional access to commercial, high volume furniture and fixture suppliers. The items involved here are manufactured by modern machinery and are readily available and can for the most part be considered "off-the-shelf," catalog-type items carrying a list price. It is interesting to note that none of the items acquired by Westgate for use in the hotels to satisfy this utilitarian plan are involved in this dispute. [649]
2. The second class of activities involved re-creating the aura of the French nobility and privileged aristocracy that existed in Europe in the Eighteenth Century. This aura was intended to surround and permeate the common areas and the luxury suites in the Westgate Plaza Hotel. The antique furnishings, fixtures, and objects-of-art that were acquired for the purpose of carrying out this "design intent" are principally the items that are the subject of Mrs. Smith's claims and that are in dispute here. (Hereinafter referred to as class 2 items).

It is uncontradicted that Mrs. Smith alone, with the assistance of Mr. Smith, conceived and implemented the plan to re-create the French regal surroundings

that were to be the hallmarks of excellence that would distinguish the Westgate hotels. These universally recognized symbols of elegance and "class" were intended to mark the Westgate Plaza Hotel as one of the world's finest and one that was "fit for a king" and suitable for housing presidents, heads of state, and very important person.

Clearly, the furnishings and objects-of-art required for this plan were not available "off-the-shelf" from commercial suppliers. They carried no "list price." Mr. and Mrs. Smith had to travel to various parts of the United States and Europe to acquire them. They attended auctions, went to auction houses, art dealers and collectors of antique art. Mrs. Smith, a collector of antiques and art objects herself, supplied many items from her own collections to satisfy the plan. All of these items are in a class by themselves; and they were treated as such by every person who moved, marked, handled or [650]

stored them.

When a decision was made by Mrs. Smith to acquire various items, they were delivered to receiving points and storage areas under the control of the Westgate or the USNB entities. This practice was also followed when items from Mrs. Smith's personal collections were selected for use as part of the plan. As the purchasing program gained momentum and the volume of items increased, informal procedures were developed by the Westgate-Kropp group to implement the special purchasing and receiving program. These procedures did not conform to the standard purchasing-receiving procedure outlined in the Westgate Procedure Manuel that was developed to standardize purchasing and ac-

counting procedures to comport with accepted accounting practices. The deviation from the standard procedure (i.e., request for purchase order, approval of request; issuance of purchase order, receiving slip, receipt, inspection and verification of incoming shipment, assignment of asset number, recording asset in asset inventory, approval, for payment by the accounting department, and issuance of the check) was justified on the basis of the usually flexible nature of the antique purchasing program.

It was not uncommon for Mr. C. A. Smith to have checks issued for furniture purchases without anything more than an oral request for a check, which was complied with immediately. One check so issued by Westgate, in the amount of $100,000.00, was to be used as a deposit at the Jean Owings Auction; and this was followed by another check for $79,000.00. There were others, Mr. Smith personally approved the payment of 1.5 million dollars for purchases made by Helen Smith, dba IID. It can be readily seen that when checks were issued before the items are even bid on or identified with certainty, [651]

there can be considerable confusion when the items arrive in the receiving area. Just such a situation developed, and the Westgate-Kropp group faced this problem and developed techniques to handle the situation as it developed.

When the antique furnishings, paintings, etc., arrived at the receiving area, they were segregated from the routine commercial shipments; because in addition to the paperwork and identity problems, they required special handling. It was well-known to the Westgate-Kropp group that Mrs. Smith was primarily responsible

for having the shipments delivered. Special storage areas were allocated for these shipments at the commissary, G. Street warehouse, and the basement of the Westgate Plaza Hotel. These areas became known as Mrs. Smith's storage areas, and the items were generally referred to as "Mrs. Smith's."

As the deliveries were made, the person working in the receiving area would list each item with a brief description; and if no instructions were previously issued, a call or memorandum would be directed to Hilda Edmunds or the IID office in La Jolla, who would issue instructions concerning the disposition of the item and the paperwork requirement. The items would be placed, as directed; and Hilda Edmunds or Beverly Fenton would process the paperwork. The paperwork involved the typing of IID invoices, if a Westgate purchase order existed. If no Westgate purchase order existed, then a Westgate purchase order would be prepared along with an IID invoice; and sometimes IID would simply submit an invoice to Westgate for payment.

Paperwork for both IID and Westgate was initiated and processed by Westgate employees located at the IID office in La Jolla, California. All of the IID payroll and office [652]

expenses, i.e., clerical, copying equipment, mailing, etc., were paid for by the Westgate California Corporation.

In this way then, Mrs. Smith exercised supervisory influence over, not only the selection and the purchasing, but also the receiving, inspection and "accounting procedures" followed by the Westgate employees for all of the class 2 items she supplied to Westgate.

Apparently, the Comptroller's office of Westgate California Corporation was aware of the problems being created by the informal procedures involving class 2 items being sold to the corporation by Mrs. Smith. Mr. Sutter, the Westgate comptroller, has so testified; but he apparently felt that he was powerless to correct the situation. Mr. Saul Messer, one of the series of controllers for the Westgate Plaza Hotel, testified that he was greatly concerned over his inability to monitor, much less control, the purchasing and asset controls over the class 2 items. He also testified that Mr. Sutter was unable to assist him in correcting the situation. Mr. Sutter testified similarly, and when pressed, Mr. Sutter admitted that he was acutely aware of the fact that Mrs. Smith was the wife of the chief executive officer of the Westgate California Corporation and was reluctant to press the issue for fear of the consequences to him. (See transcripts of testimony of Mr. Sutter and Mr. Messer).

The court finds that the basic reason for the failure of the Westgate California Corporation to properly account for the assets that it was purchasing through Mrs. Smith was a fear of Mrs. Smith on the part of Westgate's responsible managers and controllers because of her relationship to C. A. Smith. Mrs. Smith had become, in the minds of the officers and managers responsible for the fiscal integrity [653]

of the Westgate California Corporation, a person whose decisions and methods of operation could not be challenged even though such decisions and operations had a direct and significant effect on the financial systems under their direct control. For these men, Mrs. Smith's identity had merged with that of her husband, C. A. Smith. She had become his alter ego; and they did

not intend to invoke his or her displeasure, regardless of the accounting and financial chaos that such silence would engender.

Counsel for Mrs. Smith urges that this was Westgate's problem and not her responsibility. In making this argument, Mrs. Smith overlooks the fact that she was pledged to serve Westgate; and in providing this service, she was bound to provide all information required by Westgate's controllers. She in fact supervised the "front line" Westgate personnel handling the class 2 items, authorized invoicing and sometimes the issuance of Westgate purchase orders from her own office. She was in fact, and this is clearly undisputed, the single source of all information on the class 2 items purchased for Westgate.

It is further no answer to the problem of inadequate information that IID was audited by Westgate's auditors. The auditors' certificates for four years prior to 1973 were withdrawn by the very same auditors (See Exhibit N).

The accounting and asset control chaos and resultant financial loss to Westgate that did in fact occur is best illustrated by the results of the court's examination of Westgate's handling of purchases made at the Jean Owings auction in 1969 by Mr. Smith, with Mrs. Smith's assistance. Additional light is shed on this problem by the court's analysis of some of Mrs. Smith's claims for major items of furniture. [654]

[655 Blank]

GENERAL CATEGORIES OF HELEN SMITH'S FURNITURE CLAIMS

Helen Smith's claims for items located in various Westgate areas may be broken down into general categories on the basis of her claims.

The first category contains those items that have been identified with an IID inventory asset number that Helen Smith claims were never invoiced to Westgate.

The second category contains those items that have been identified as Helen Smith's personal property that was placed in the Westgate areas for her own personal use.

The third category contains those items that Helen Smith claims on behalf of C. A. Smith as a gratuitous bailee.

The fourth category contains items that Helen Smith claims as gifts from Mr. Smith.

The fifth category contains items that Helen Smith claims she "loaned" to the Westgate entities for their use.

In support of the above claims, Mrs. Smith has submitted voluminous supporting documentation, including invoices from suppliers, copies of sales slips, copies of letters to sellers, etc. (See Exhibits 6, 60, 61, 62, 70, and 70A). The court has attempted to examine this documentation and compare it with the IID invoices (Exhibit 55), that have been prepared and submitted to Westgate during the six-year period IID was in existence. This was a formidable task. The court had great difficulty, because of the limited verbal descriptions [656]

on the IID invoices coupled with numbers and letters that even Mrs. Smith could not explain. The confusion that is created by inadequate descriptions and identifications, coupled with the large number of items similarly described on IID invoices, renders it impossible for the court to be satisfied that any given item was not invoiced. For instance—is a "marble top table" a "Louis XVI marble top table"? Is a painting "portrait of a gentleman" also a painting "portrait of a man"? Are "cavaliers" "Knights on horses"? Are "fire dogs" the same as "chenets"? Is a "gold console" the same thing as "an antique gold console"? It can be appreciated that this type of "match up" is not very reliable, particularly in the light of the court's detailed analysis of the many major items that have been incorrectly claimed by Helen Smith.

The documentation supplied by Helen Smith does prove that she was responsible for the purchase of the items claimed. On that point, there was no dispute. It is accepted as fact that she did indeed purchase all of the class 2 items sold to Westgate. It is also a fact that Helen Smith had all of the claimed items delivered to Westgate storage areas and placed them in the control of Westgate employees. It was Mrs. Smith himself who ordered that the items now in the subbasement storeroom be moved from the storage areas of the Westgate Plaza Hotel. Mr. Toft also wanted that move made (See Mr. Toft's Deposition, Pages 52 and 53). They believed the risk of loss was Westgate's. [657]

As to the first category of claims, involving some 126 items, based upon the identification by IID inventory number; if the court was to find that these items were not in fact invoiced to Westgate, would that

fact alone entitle Helen Smith to prevail in her claims? This court believes that the answer to this question depends upon Helen Smith's legal and equitable relationship to the Westgate California Corporation. Helen Smith's IID claims are apparently based upon her belief that she was an independent contractor. The Trustees, on the other hand, insist that Helen Smith, whether doing business as IID or Helen Smith, was an agent of Westgate and subject to fiduciary duties and obligations that preclude her from doing business for her own benefit at the expense of, and to the detriment of her principal, Westgate.

The court has before it documentary evidence that best defines Helen Smith's legal relationship to Westgate California Corporation. This is the "letter of Agreement," signed by Helen Hill and C. Arnholt Smith (See Exhibit 1). Exhibit 1 is a Xerox copy of a letter that is entitled, "Letter of Agreement." It is in fact a letter directed to Westgate California Corporation, Attention: C. Arnholt Smith, from Helen Hill.

The purpose of the letter is explained in paragraph 1, "for the purpose of reducing to writing our oral understanding concerning *my employment* by Westgate California Corporation . . . for design work and to [658]

purchase furniture and fixtures, goods and services, for the hotel-motel and the large hotel . . . and other buildings planned in the complex on which I am presently working" (emphasis added). Clearly, this paragraph indicates that Helen Hill was then employed by Westgate California Corporation and had been employed for some time.

The second paragraph is a recital that refers to "design work." Helen Hill states that she will devote,

"full time to this project for a period of one year." This is followed by a recital of the rights to cancel the contract by each party. In addition, this paragraph recites that, "W.C.C. and I agree that it is not possible at this time to determine the period of time that this *employment contract* will cover. . . ." (emphasis added). Further along, Helen Hill states, "This agreement concerns only my personal services and does not include additional people that may be required." Then Helen Hill makes it clear, "that the cost of all additional personnel will be borne by W.C.C. even though such personnel may work under my direction and supervision in various capacities." In addition, there is a recital that Westgate was considering hiring an interior decorating *firm* to assist and that W.C.C. would pay all of the fees and charges.

In paragraph 3, Helen Hill describes her position as, "project consultant," and she outlines her duties in that regard. [659]

In paragraph 4, Helen Hill is delegated the *final decision-making authority* concerning the items that will be used in the buildings. This final decision-making authority extends to color schemes, paints, window treatments, walls, etc., *selecting and purchasing* all fabrics and trim; further, the *selecting and purchasing of all items* from the light switches to floral arrangements, leaving out nothing, that are to be used in every single area of the hotels, from the office areas to ballrooms. In this paragraph, Helen Hill also recites that she will locate sources of supply at her own expense and pay her own travelling costs.

In paragraph 5, Helen Hill recites the design consultant fee in terms of monthly salary figures, i.e.,

$3,800.00 per month for the small hotel and $5,000.00 per month for the large hotel and adjacent buildings. Helen Hill then recites that, "*This amount will not be due or payable until* the entire project, including the large hotel and other buildings in the four block complex, are completed." There is also a recital that the fees are retroactive to the date Helen Hill commenced work pursuant to oral agreements with officers of W.C.C. This date is not specified. The recital goes on to say that $3,800.00 per month will continue until all possible additions to the buildings or any other additions, not within the present contemplation of [660]
W.C.C. are accomplished, "under my design direction and supervision."

In paragraph 6, she recites that Helen Hill has the sole discretion in deciding how these fees will be paid to her.

In paragraph 7, Helen Hill again recites that the contract can be terminated upon 30 days written notice; but if not so terminated, then Helen Hill will continue on a month-to-month basis for the complex insofar as maintenance, replacement, etc., and expands her role to all Westgate properties, wherever located. Helen Hill further states that she will purchase goods and services for these other Westgate properties under the same terms and conditions.

In paragraph 8, Helen Hill states that she will purchase all items previously mentioned for W.C.C., for both hotels, as well as all other buildings in the complex. She then recites that she will be supervised by Herb Williams, both on the design consultant phase of her work as well as on the purchases; but that Herb Wil-

liams will consult with her on a daily basis on all matters. Helen Hill further states that Herb Williams, "is to approve of all purchases in advance to be made by me both from the standpoint of product and price, as well as the percentage of discount given by me off the list price to W.C.C." The letter goes on to say that the discount off the list price will be not less than 25% as a general rule, and that is what Walter Broderick had been giving for the items that firm previously supplied to W.C.C. The last sentence of this paragraph states, "*I will agree to pay for all goods and services I purchase for W.C.C.* and will in turn bill either monthly or at regular intervals for these items." (Emphasis added) [661]

In paragraph 9, Helen Hill asks for acceptance of agreement if the letter "is in accordance with your understanding of our agreement," by initial and signature.

Paragraph 10 directs that any item that is, "contrary to your understanding" or not in keeping with, "our oral agreement" then it should be struck out.

The letter is signed, "Very Truly Yours, Helen Hill."

Immediately below that, it is signed by C. Arnholt Smith for the Westgate California Corporation, alongside "Agreed to and Accepted," and dated by hand, "April 17, 1967."

Immediately below C. Arnholt Smith, Helen Hill signed alongside, "Agreed to and Accepted" and dated by hand, "April 17, 1967."

Carbon copies are directed to Philip A. Toft and Herb Williams. There are no strikeouts visible on the copy of the agreement, and each page is initialed as directed.

The real question to be decided here is, "What legal relationship did this Letter of Agreement create between Helen Hill and the Westgate California Corporation"?

Paragraph 1 of the agreement speaks in terms of "employment" to do "design work."

Paragraph 2 speaks in terms of devoting "full time" effort for an indefinite period under the "employment contract," that can be terminated any time after one year by either party. It further makes it clear that it is a contract for "*only my personal services*" and that Westgate must bear all other costs.

Paragraph 3 defines Helen Hill's job description and outlines Helen Hill's agreement to work with "all such people," i.e., other Westgate people, other interior decorating firms hired by Westgate and the *contractor.* [662]

Paragraph 4 outlines her duties, responsibilities, and authority to decide for Westgate, and also allocates purchasing functions to Helen Hill.

Paragraph 5 outlines the method of compensating Helen Hill as being deferred at her option for a period that is uncertain as to its starting point and equally uncertain as to its ending point.

Paragraph 6 makes it clear that Helen Hill will decide on when and how Westgate will pay her design fees.

Paragraph 7 again recites the termination at will option by each party, but in addition it extends Helen Hill's personal services to all other Westgate properties wherever located.

Paragraph 8 recites the understanding that Helen Hill will have authority to make purchases of goods and services for Westgate, but that in this area, as well as in the area of design consultation, Helen Hill is to work under the direct supervision of Herb Williams, a Westgate manager. It is clear that all items purchased by Helen Hill pursuant to this agreement were to be totally approved in advance by Herb Williams, Helen Hill's supervisor. In addition, the agreement recites that Westgate is not agreeing to limit its purchasing function to that performed by Helen Hill, but can also purchase elsewhere. Helen Hill agrees to give Westgate the same discount off list price that Westgate obtained from other suppliers. There is further a statement that one-third advance payment is required on all items ordered. Helen Hill further states that she will agree to pay for all goods and services so purchased for W.C.C. and will in turn bill W.C.C. at regular intervals.

There is no statement whatsoever concerning any [663]

differential in Helen Smith's purchase price for the Westgate items and the price that Westgate was to pay for them. The entire thrust of the paragraph in this regard is that Westgate will pay no more for the items than it was previously paying Walter Broderick, and that was as a general rule 25% off the list price. There is no mention of those unique items that have no "list price." Apparently, the prior approval of all purchases by Helen Hill's supervisor was thought to be a sufficient safeguard under the circumstances.

In summary, this agreement provides that Helen Hill was to provide personal services only; she was to

perform specified tasks; she was to accrue compensation to be paid in the future, and this compensation was to be in the form of a deferred monthly salary; she was to serve Westgate on a full-time basis for an indefinite period of time, so long as she was happy to serve Westgate and Westgate was happy with her services; she was to be supervised in her every activity by Westgate's manager, Herb Williams; her purchasing function was subject to the prior approval of her Westgate supervisor; in the purchasing function, she was to locate the source of supply at her own expense; she was to pay for all goods and services purchased by her and to bill Westgate periodically; and she was to give Westgate the same discount off list price that Walter Broderick gave Westgate.

This agreement certainly appears to be an agreement intended to create an employer-employee relationship. However, there are items in the agreement that are unusual and inconsistent with a conventional employer-employee relationship. The terms that provide for Helen Hill's [664]

payment of her expenses to locate sources; to have her pay for the items purchased for Westgate; and then to have Helen Hill bill Westgate, are not the usual requirements for employees. Another inconsistent provision is the condition precedent to Helen Hill's right to acquire accumulated salary for personal services, i.e., the completion of the entire four block complex.

Considering all of the above, it is the finding of this court that the Letter of Agreement did not create a conventional employer/employee relationship between Helen Smith and Westgate California Corporation.

A similar analysis of the terms shows that the Letter of Agreement does not create the status of an independent contractor for Helen Smith; the agreement provides for personal services over an extended period of time and contemplates permanent employment; it recites supervision of all activities; it recites the providing of all support personnel; the method of payment; and it involves the regular type of work that Westgate was required to perform in its hotels on a continuing basis.

Overall analysis of all of the terms of the agreement shows that Westgate has delegated, by the agreement, the authority to Helen Hill to act on its behalf to coordinate interior design activities between itself and the architects, interior design firms, and the building contractors; the authority to purchase items for its use; and the authority to establish the purchase price of the items that it will buy. Westgate has also, by the terms of the agreement, reserved the right to supervise all of the Helen Hill's activities; the right to require prior approval of all purchases by Helen Hill; and the right to require Helen Hill's full-time effort on its behalf. There is no provision in the agreement whatsoever that allows Helen Hill to conduct any of the recited [665]

activities for anyone's benefit other then Westgate California Corporation.

It is the finding of this court that the "Letter of Agreement" created the relationship of Principal and Agent between Westgate California Corporation and Helen Hill. Helen Hill was clearly employed by Westgate to perform personal services for its benefit and its benefit alone, not as a conventional salaried em-

ployee, but rather as its agent who could speak for Westgate, act for Westgate, and commit Westgate to financial expenditures of its funds. As an agent, Helen Hill was a fiduciary and subject to all of the duties and obligations that such a fiduciary relationship entails. (See Restatement 2d, "Agency")

So much for the "Letter of Agreement." How was the agreement implemented? Did Helen Hill, in fact, act as an agent for Westgate? The evidence presented to the court on this issue may be summarized as follows:

1. International Interior Designs (IID) is merely a fictitious business name of Helen Hill (now Mrs. C. A. Smith) (Transcript, Page 20).
2. IID started doing business in January 1967, about the time Helen Smith began working exclusively for Westgate California Corporation (Transcript, Pages 2419, 2420, 2421, Exhibit i).
3. Westgate California Corporation or other Smith-controlled entities paid for all operating expenses of IID. Westgate paid for IID's personnel with its own payroll checks. (Transcript, Pages 65, 1089, 1090). Westgate paid for the services of Phil Conard, a Rhia Construction company employee, to work [666]

   exclusively for Helen Smith on the 19th floor suites and other decorating tasks.
4. Westgate paid for Xerox costs for IID (Exhibit XV, Transcript 1692-93), and the office machinery was paid for by USNB. Westgate's service and financial assistance to IID was so complete that IID had virtually no operating

expense (See Exhibit 56, Transcript Pages 85, 1358).

5. IID was financed by Westgate and Smith-related entities. (Exhibit X, Exhibit 56, Transcript, pages 1168-1170).

6. Westgate employees took orders and directions from Helen Smith. These employees of Westgate picked up and delivered items of furniture, etc., and made inventories. Westgate Plaza Hotel employees testified that the staff considered Helen Smith to have power and control over the decorating and furnishing of the hotel. The assistant hotel manager and the chief of hotel security testified that Helen Smith exercised complete control over the hotel furnishings from the date it opened until it went into receivership.

7. When dealing with third parties, Helen Smith held herself out as an agent of Westgate. She testified that she went to New York to locate and hire a firm to make drawings of the Westgate Plaza Hotel. (Testimony of Helen Smith on May 15, 1975, Pages 29-30). After she had secured the firm she wanted, C. Arnholt Smith flew to New York to close the deal. Helen Smith [667]

   determined which businesses would be allowed to rent space in the Westgate Plaza Hotel, a decision discussed only with C. Arnholt Smith. (Testimony of Jim Bucher, on August 30, 1975, at Page 1887.) In addition to selecting these businesses, Helen Smith assumed authority in dealing with these tenants on other matters. (Testimony of Jim Bucher on August 20, 1975, at Page 1916-1917).

8. Helen Smith had total authority, subject only to the approval of C. Arnholt Smith, in the purchasing of items for the hotel and other areas. (Testimony of Saul Messer on August 19, 1975, at Page 1727).

9. The accounting system used by IID in the sale of furniture to Westgate shows that there was no concern for accountability and a total disregard for the keeping of proper records. All antiques were bought without purchase orders (Testimony of Helen Smith on August 14, 1975 at Page 1409). Purchase orders were issued by Westgate only after the antiques were bought. (Testimony of Helen Smith on August 25, 1975 at pages 2252-2253). All antiques were shipped to either the Commissary or G. Street Warehouse and then to the Westgate Hotel storage areas, entities owned and controlled by Westgate or other companies controlled by C. Arnholt Smith. On some occasions IID issued purchase orders to itself purporting to come from Westgate. (Testimony of Helen Smith on May 22, 1975 at Page 569.) There were also occasions when [668]

   type-written numbers would be used on invoices, and invoices were sent which had no numbers on them whatsoever. (Testimony of Hilda Edmunds on August 13, 1975 at page 1330).

Based upon all of the above, coupled with Mrs. Smith's conduct in handling items from the Jean Owings auction; the expenditure of Westgate funds to refurbish and reupholster furniture and other items of personal property "on loan" to Westgate; the "crediting" of Westgate's property into IID inventory; the charging

of freight, moving and special handling expenses, as well as travel expenses for herself and her personal property; the use of Westgate property as part of payment for "personal" items purchased for herself; this court finds that Mrs. Smith's attitude toward Westgate can only be understood in the context of a Principal-Agent relationship.

This court therefore finds that Mrs. Smith was in fact and in law an agent of the Westgate California Corporation.

Based upon the above analysis, the finding of an agency relationship between Westgate and Helen Hill Smith, and the fact that all of the items in the first category (HD items) were delivered into Westgate's custody and control; it is the finding of this court that these items were purchased for the benefit and use of the Westgate California Corporation. Insofar as any alleged right of Mrs. Smith to assert control over these items by virtue of a lease or otherwise of the Westgate areas controlled by her, then that right limits her to hold these items as a constructive Trustee for the benefit of Westgate. These "lease" agreements are discussed elsewhere in these findings.

Insofar as the second category of items is concerned, [669]

the above analysis is equally binding as to those items which were purchased in Helen Hill or Helen Smith's name. The name that the agent uses is not controlling. Were the purchases made for the benefit of the principal? When were the items acquired? Were the items invoiced to Westgate? Were the items delivered physically to Westgate? Since all of the items are on the premis[illegible] Westgate and distributed throughout Apart-

ment 1900/1901, the public areas, the sub-basement, the Cuyamaca Club, and the G. Street locker, it must be concluded that the items were delivered to Westgate. These were intended to be used for the benefit of not only Westgate, but also for the benefit of Smith-related entities.

How does this conclusion square with the previous analysis of the relationship between Helen Smith and Westgate? To help answer this question, the court has before it another important document signed by C. A. Smith. This is Exhibit No. 2, a letter to Mrs. Smith from Mr. Smith, dated July 12, 1971. In this document, Mr. Smith expands Mrs. Smith's duties and obligations. He, by this document and by Mrs. Smith's acceptance of it, created a Principal/Agent relationship between himself, the USNB, and Helen Smith. This document in effect gives Mrs. Smith, Westgate's agent, the permission to act, not only for it, but also for Mr. Smith's other major enterprise, the USNB. As of July 12, 1971, Mrs. Smith was obligated then to serve the two major Smith-entities. The court therefore finds that the continued use of the Westgate premises for storage of items, as well as the continued purchasing by Helen Smith, was intended to benefit her principals. The court has screened the claims list of [670]

Helen Smith's personal items (HSP) and finds that all items that were purchased by Helen Smith during the year 1967 and after that have not been invoiced to Westgate or the USNB, and that are presently located on the premises of Westgate or the USNB, were purchased for the benefit of Westgate or other Smith-entities. Mrs. Smith holds them as a constructive trustee for the benefit of her principals.

All personal items purchased or obtained prior to 1967, other than by way of gift from C. A. Smith, are to be considered obtained prior to Mrs. Smith's becoming an agent and are therefore legally her personal property, and she has the right to have them returned to her. Such a list has been prepared and is attached hereto and made a part of the court's findings.

Insofar as Mrs. Smith's claims for C. A. Smith's property on the basis of a bailee relationship, Mr. Smith is entitled to his personal items that are clearly not assets of Westgate or USNB. The court has already allowed Mr. Smith to remove his personal property, such as rowing trophies, office items, personal records, contents of the safe, filing cabinets, etc., when the court took the apartment under its control. Those items that have been invoiced to C. A. Smith by IID belong to Mr. Smith.

Insofar as items in the fourth category—gifts to Helen Smith from C. A. Smith that are now on the premises. There is only one such item on Exhibit 70. A review of the "back up" data to support Mr. Smith's right to make a gift of this item, a pair of statutes of the god Mergury holding a torch, does not convince this court that the statues are Mr. Smith's property to give away. This claim must be denied. Insofar as the gifts from Mr. Smith that are shown on Exhibit 60, this court, in light of the evidence, cannot [671] honor such claims.

Insofar as Mrs. Smith's claims in the fifth category, that are based upon loans of her property, the court makes the following findings concerning the "loan documents" offered to support such claims. Mr. Bowden

testified that he executed numerous loan receipts for Mrs. Smith at her request. There is no doubt that these receipts were not executed contemporaneously with the delivery of the item (See Exhibit 15). This is prepared on the stationary of a corporation that was not in existence on the purported date.

Mr. Bowden put into context the understanding of the word "loan." He testified that he had no independent knowledge concerning purchase or payment for any of the "loaned" items either by Mrs. Smith or Westgate. He stated that he accepted Mrs. Smith's word that the "loaned" items belonged to her. When pressed by the court, Mr. Bowden testified that he was pretty sure that Mrs. Smith expected to be paid for the "loaned" items eventually (Transcript, pages 813 and 814). Mr. Toft also sheds some light on the meaning of the word "loan" (See Toft's Deposition, Pages 37, 38, and 39). He testified that two or three months prior to the opening of the Westgate Plaza Hotel he met with Mrs. Smith at the Cuyamaca Club and discussed expenditures for hotel furnishings. He told Mrs. Smith that the limit of expenditure for these items had been reached, and that Westgate would have to *hold off until later* to do anything more. He went on to say that Mrs. Smith volunteered to loan items for use in the hotel. The items were loaned and are being used in the hotels and Cuyamaca Club. Mr. Toft was unaware of the billing activities thereafter. Exhibit 55 shows a continuation of IID's billing to [672]
Westgate for furnishings on a continuing basis for 1971, 1972, and 1973.

This court is satisfied from all of the testimony, the conduct of Mrs. Smith and Westgate representatives,

that the use of the words "loan" or "on loan" as applied to items that were delivered by Mrs. Smith to Westgate for use by Westgate was a euphemism for "delivery now and billing will be deferred until later." The court finds that Mrs. Smith did not intend to reclaim the item later; Bowden knew it, Toft knew it, and Mrs. Smith knew it. This was a part of Mrs. Smith's understanding with Toft and her husband concerning deferred billing when cash flow was a problem for Westgate. If the Westgate California Corporation had not failed, there never would have been any "loan" receipts.

Mrs. Smith's duties and obligations, as Westgate's agent, rendered the whole loan receipt procedure, that was the property of Westgate on July 1, 1974. [673]

exercise in futility. Mrs. Smith did in fact deliver the items to Westgate for the use and benefit of Westgate.

This court finds that each of the "loaned" items was the property of Westgate on July 1, 1974.[673]
[674 Blank]

THE JEAN OWINGS AUCTION

In October, 1969, Mr. and Mrs. Smith attended an auction in Los Angeles. The furnishings and fixtures from the residence of Jean Hardison Owings were being sold at public auction by Marvin K. Newman, Auctioneer, (See Exhibit GGG).

Mr. and Mrs. Smith bid on various items and were successful in acquiring 83 of the 917 catalogue items at a total cost of $180,427.50. Mr. Smith paid for the items with Westgate funds (See Exhibit RR). No sales tax was levied on these items by the auctioneer, Marvin Newman. The only rational explanation for

this fact is that he considered that the items were purchased for resale by a dealer. Mrs. Helen Smith was widely recognized as a dealer. The purchased items were picked up and delivered to the Westgate Hotel Services Warehouse, hereinafter called the commissary (See Exhibit CCC). Mrs. Smith verified the receipt of the items, (See Exhibit BBB) and according to the testimony of Mr. Jack Donathan, had the items checked as they were received after delivery from Los Angeles. Freight and delivery charges were paid for by Westgate (See Exhibit ZZZZ).

Some items were thereafter delivered to the Westgate Plaza Hotel and others elsewhere. Many of these auction items appeared on Mrs. Smith's original claims list as being her personal property (Exhibits 6, 60). Some were described in the Lease Agreement for Apartment 1900/1901 as being her property (Exhibit 3).

Mrs. Smith testified that Mr. Smith had paid for the Jean Owings auction items with his own funds and had made gifts to her of many items purchased at the auction.

Evidence produced during the trial showed that Mr. C. A. Smith had been given checks drawn on Westgate's [675]

account in the amounts of $100,000.00 and $79,000.00 for the purpose of purchasing furniture for Westgate Plaza Hotel from Marvin K. Newman, Auctioneer. Clearly, Mr. Smith paid for the Jean Owings auction items with Westgate's money (See Exhibit RR).

When this evidence was introduced during the trial, Mrs. Smith withdrew her claims for any items that could be identified by the other parties as Jean Owings Auction items.

Physical inspection of the existing furniture and searches within the hotels and warehouses indicated that 27 major items, plus seven partial items, that cost Westgate $53,516.00 were not located in the Westgate or FDIC controlled areas (See Exhibit JJJ).

Additional examination of items claimed by Mrs. Smith inside Apartment 1900/1901, after the court took exclusive control on December 15, 1975, revealed that four tables claimed by Mrs. Smith as being her personal property, acquired elsewhere, were in fact Jean Owings auction items (See Testimony of Earl Holding, Vol. XXVII, Pages 3786-3796). These tables are Items 51, 91, 189, and 361 in the Jean Owings catalogue (Exhibit GGG), and cost Westgate a total of $3,750.00 (See Exhibit DDD). Claims for these four tables are shown on claims list, Exhibits 6 and 60; and there is "backup data" for the claims on Exhibit 61.

Item number 18 on Exhibit 60F is described as, "Two French round marble-top end tables (not quite a matching pair)". Mrs. Smith claims to have acquired these tables from Andre's Botique and shows them as IID inventory items, number 72-78 A and B. Exhibit 61F, Item 18, contains an invoice, dated May 17, 1972, from Andre's Botique in New Orleans for a number of items. Item number one on the [676]

invoice is described in typed letters, "Louis XV Marquetry and Bronze dore table." There has been added to this description the following handwritten letters: an "s" has been added to the word "table" to make it "tables"; and a "Pr" has been added immediately thereafter, making it "tables Pr." Immediately in front of the description, there appears in handwriting, "72-78 two."

The IID inventory list, Exhibit 62, was examined; and it shows asset No. 72-78 described in typewritten letters, "Louis XV Marquetry and Bronze Dore Table." There has been added in pencil handwriting an "A&B" after 72-78 and also a handwritten "2" squeezed in front of the description, and again, an "s" in handwriting has been added to "Table" to make "Tables." Written by hand underneath is the phrase, "not exactly Pr." These tables are in fact Items 51 and 361 in the Jean Owings auction catalogue, Exhibit GGG.

Item number 30 in Exhibit 60B is described as a Wood and Onyx Table." The "backup" information shows a check made payable to "Camellia House," dated May 20, 1963, signed by M. H. Alvarez (Mrs. Smith's earlier name) to support Mrs. Smith's claim that she purchased the item from "Camellia House" at that time. Upon examination as outlined above, the table has been positively identified as Item number 189 in Exhibit GGG. It was in fact purchased at the Jean Owings auction and was the property of Westgate on July 1, 1974.

Item number 3, Exhibit 60G, is described as, "1 round onyx table", purchased from "Andre's Botique" and is further identified with an IID inventory Number 72-86. Exhibit 61G shows the "backup" information as an original invoice from Andre's Botique that has two items described. Item number 2 is described originally as, "1 gold leaf, onyx top table." [677]

The words "gold leaf" have been stricken out by a different color pen, and the words "fruitwood" have been added to change the description to "fruitwood and onyx top table." Exhibit 62, IID inventory item 72-86 shows the description in typewritten words, "gold leaf, onyx top table" from Andre's. Here too,

the words "gold leaf" are stricken out with a pen, and the word "fruitwood" is written immediately over the strike out. It is interesting to note that the Andre's invoice and the IID inventory alterations were made in identical ink. This table too has been positively identified as being item number 91, Exhibit GGG, that was purchased from the Jean Owings auction, and it was the property of Westgate on July 1, 1974.

Item number 16 on Exhibit 60B is a French cocktail table from the Jean owings auction. The basis for Mrs. Smith's claim for ownership is a "trade" with someone. The other item in the "trade" is a gold leaf, green onyx top table located in the lobby of the hotel. There is no "backup" information in Exhibit 61B to support this claim for the "traded" items, nor is there any "backup" information in Exhibit 70A.

The table that is the subject of the Andre's Botique invoice (Exhibit 61G), i.e., the "gold leaf onyx table" is in fact the table that is located in the hotel lobby that was allegedly traded for Item 16 on Exhibit 60B discussed above.

Additional Jean Owings auction items are involved in claims by Helen Smith based upon Helen Smith's acquisition elsewhere, not only as gifts from C. A. Smith.

In the living room of the Apartment 1900/1901, there is a French marble fireplace, a truly unique item, purchased at the Jean Owings auction (referred to in the "lease" as [678]

property of Helen Smith). Helen Smith withdrew her claim to this fireplace during the trial. Associated with the fireplace is a pair of andirons that are equally unique (See item 21, Exhibit 60B). Mrs. Smith disputes

the contention by the FDIC that these andirons were purchased at the Jean Owings auction (See Item 288, Exhibit GGG, page 98). Mrs. Smith insisted that she had acquired them from Virginia McLaughlin in 1964 (See Transcript, Vol 16, Pages 2095-2100). There is a photograph in Exhibit GGG that shows the fireplace set up in the Owings' home. Andirons (or "chenets" or "firedogs") are partially shown in the photograph. The court examined the andirons in Apartment 1900/1901 and the description in the Jean Owings catalogue. The court finds that the andirons in Apartment 1900/1901 are the andirons purchased at the Jean Owings auction.

The photographs in the Jean Owings auction catalogue (Exhibit GGG, pages 112 and 133) show that Mrs. Smith is also incorrect in her claim for the antique desk set (See Item 29, Exhibit 60F). Mrs. Smith claims that she purchased the desk set from George-Georges and has supplied a sales slip as "backup" data to prove her claim (See Transcript, Vol. 16, pages 2100-2102). A comparison of the desk set itself with the photograph on pages 112 and 113 of the catalogue (Exhibit GGG and description of Item 306) by the court confirms that they are one and the same; and the court so finds. The desk set was purchased at the Jean Owings auction with Westgate funds.

The history of the handling of the items purchased at the Jean Owings auction clearly illustrates the problems the Westgate California Corporation encountered in accounting for class 2 assets (antiques, etc.) acquired for its benefit [679]

by Helen Smith and C. A. Smith. There was no prior authorization for expenditures in excess of

one hundred thousand dollars; no permanent Westgate asset numbers affixed to the individual items; no recordation of the assets in the asset ledger or asset inventory; no location index for the individual items; no control over the movement of the individual items; and no questions asked of either Mr. or Mrs. Smith or no accounting by them of the disposition of the items.

Mrs. Smith alone controlled the movement and location of the auction items that remained within the Westgate Plaza Hotel and storage areas. Her control was so complete that it affected her own ability to discriminate between her own interests and the interests of the Westgate California Corporation.

The evidence shows, not only by a preponderance, but also beyond a reasonable doubt, that each and every item purchased at the Jean Owings auction in October 1969 was paid for by the Westgate California Corporation; and further, that the freight costs, storage costs, and all related costs for storage, transfer, and movement were paid for by Westgate California Corporation and the Westgate Plaza Hotel.

The court, therefore, finds that as of July 1, 1974, immediately prior to the sale of the Westgate Plaza Hotel and its furnishings to the California Little America Corporation, legal title to each and every item shown on Exhibits FFF and DDD was held by the Westgate California Corporation, regardless of the location of any individual item. As to the twenty-three full items and seven partial items that are still missing and unaccounted for from the Jean Owings auction, that cost Westgate California [680]

Corporation $49,766.00, plus sales tax liability, it is patently clear to this court that they have been misappropriated and converted to the use of persons other than the true owners. The court finds that only two persons were in a position of authority over the movement of these items, and these persons are Mr. and Mrs. C. A. Smith; and they are therefore jointly and severally liable to the Westgate California Corporation for the loss sustained by Westgate. [681]

[682 Blank]

FACTUAL ANALYSIS OF INDIVIDUAL CLAIMS

FRENCH BEDROOM SUITE

A French bedroom suite, Louis Phillipe style is claimed by Helen Smith as her personal property. The bedroom suite is claimed in Exhibit 60G and is located in the "upstairs" bedroom of Apartment 1900/1901. Helen Smith, in support of her personal property claim, relies on the "back up" data contained in Exhibit 61G. This is a copy of an invoice from Marie Lallemont, dated November 1, 1966, that refers to "1 old French bedroom suite . . . . 4 pcs. etc." all for a "Sp. pr" of $2,800.00, and no sales tax is charged. The description on the Lallemont invoice does not quite fit the description of the item on the claim list, i.e., "1 bedroom suite, Louis Phillipe style, standard bed w/headboard, footboard, side rails with gold metal mounts, mahogany; and 1 Armoire—TV and drawers built inside—2 doors mirrored with gold mounts, mahogany and one pair bedside tables." Subsequently, Mrs. Smith testified that the supporting data in Exhibit 61G for the bedroom suite did not really apply. Helen Smith then related the circumstances that were involved

in acquiring the bedroom suite (See Vol. XXVI of the Transcript, Pages 3553 through 3559; Transcript Vol. XII, Pages 1398 through 1414 and Exhibit FFFF). In substance, Helen Smith's latest testimony is that she bought a bedroom set and invoiced it to Westgate: she had the bedroom set refinished, but it was ruined; and she billed Westgate for the cost of refinishing it none the less. She then "traded" Westgate's bedroom set to Margo Marquez for still another bedroom set that is now in the sub-basement and also claimed by Helen Smith as her personal property. Helen Smith explained that the claimed [683]

bedroom set in Apartment 1900/1901 came from John Hill, that he had purchased it from Marie Lallemont (the invoice from Lallemont in 16B shows that it was made out to "Mrs. Hill"), and that she then traded a bedroom set she brought from Tulsa for it. There is no further mention of the bedroom set shown on IID invoice 885 which describes a queen-size bed and armoire for Apartment 1900/1901.

Upon reviewing Helen Smith's testimony and the associated exhibits, the court finds that Helen Smith is confused. Her explanation, in face of the documentary evidence, is simply not convincing. She has repudiated her own back up information in that she claims she did not buy the bed from Lallemont, but that her former husband, John Hill, did. The Lallemont invoice shows the contrary.

Analysis of the IID invoices pertaining to beds for Apartment 1900/1901, shows that Westgate Plaza Hotel paid a total of $5,889.00 to IID and should have received in return: "a Queen bed" (See Exhibit FFFF—letter from Hilda Edmunds to Kropp, May 18, 1971)

per the trade to Marquez (there was no "credit memo" involved, only Hilda's explanation to Kropp of the way Westgate's property was being treated by Helen Smith); a Louis XVI Queen size bed with Ormolu trim and an Armoire; and 1 French bed that had the head board refinished. This accounts for the traded "queen bed" now in the sub-basement; the French bed, characterized as an Eastman French bed on invoice 164; and the Louis XVI queen size bed on invoice 885. This works out to two beds in Apartment 1900/1901 (small bedroom and master bedroom), plus one in the sub-basement.

The court finds that Westgate did buy a twin bed set (IID invoice 164); that this was traded by Helen Smith to Margo Marquez for another bedroom set; that this set is now in the sub-basement (Item No. 1055 on Exhibit 33); that [684]

Westgate bought a French bed (IID invoice 164); that the headboard for this bed was refinished (IID invoice 630); that Westgate bought a queen-size bed and Armoire (IID invoice 885); that the bedroom sets now in Apartment 1900/1901 are composed of components of all of the above, including the bed spreads; and that they were bought and paid for by Westgate.

THE GRANDFATHER CLOCK IN THE LOBBY

Helen Smith claimed the grandfather clock in the hotel lobby as her personal property. Exhibit 28, item number 11, shows the clock, and it is claimed to have been acquired by Helen Smith from the "Arthur Cameron Estate." There is no back up data to support this claim. The evidence shows Westgate Plaza Hotel purchased one grandfather clock from Ames Art Gallery

and the other grandfather clock from IID for Apartment 1 (an alternate identiy for Apartment 1900/1901, see Exhibit IIIII). The court finds that Mrs. Smith's explanation for her claim is not credible, and the grandfather clock in the lobby of the hotel belonged to Westgate on July 1, 1974. [685]

THE THREE PIECE CLOCK SET

Helen Smith claims personal ownership of an antique marble bronze clock set that is located in the lobby of the Westgate Plaza Hotel (See Exhibit 28, item number 1). Helen Smith's supporting data is a copy of an invoice from Marbro Lamp Company that describes a three piece clock set, No. 2495, costing $250.-00. Mr. Caver of the Marbro Company testified that the clock set claimed by Helen Smith is the one that was sold to Helen Smith. IID invoice number 101 (See Exhibit 55) shows that a three piece clock set purchased from A.A.G. (Ames Art Gallery) with number 9482 was sold to the Westgate Plaza for the sum of $2,500.00. The claimed clock set is also shown on Exhibits 23 and 39 (Leona Wood's list made for Helen Smith). On Exhibit 23, Page 2, Leona lists the claimed clock as coming from Ames and also shows the number 9482, as well as showing IID invoice No. 101.

The court has examined the clock set in the lobby of the hotel. The court is satisfied that Helen Smith and Mr. Caver are incorrect. It takes little expertise to determine that the claimed clock set is worth far more than the $250.00 shown on the Marbro invoice. The clock set shown on that invoice is simply not the clock set in dispute. To find otherwise, the court would have to believe that Helen Smith invoiced

the Westgate Plaza Hotel for an amount ten times her purchase price; and that Leona Woods was totally wrong when she recorded the data pertinent to the subject clock set.

The court chooses to believe that Leona Wood's listing, and IID invoice 101 properly describes and identifies the clock set as being the property of the Westgate Plaza Hotel. The claimed clock set was the property of Westgate on July 1, 1974. [686]

ROUND GOLD LEAF TABLE—PUBLIC AREAS

In the public area of the Westgate Plaza Hotel there is a round gold leaf table that is claimed as Helen Smith's personal property. This table is shown as item number 8 on Exhibit 70. It is described as a "coffee table"—"Round Gold Leaf with Black Marble Top" number "338," IID invoice No. 397 on Exhibits 23 and 39.

IID invoice No. 397 shows that the Westgate Plaza Hotel purchased "1 #93722—338 Cocktail Table Louis XVI style" for $480.00 from Helen Smith. The purchase order from the Westgate Plaza Hotel No. WP. 8-0110, #11, indicates that this table is for the "Public Area." It is also interesting to note that Exhibit 39 also carries the Westgate purchase order number "8-0110".

Helen Smith's "back up" data (Exhibit 70A, item 8) shows that she purchased a coffee table for $300.00 from Sally Bradley in January, 1967. If this is the same table, then the court finds that Helen Smith sold the table to Westgate with a 60% mark up.

The court finds that Helen Smith is incorrect in claiming this item as her personal property, since she

sold it to the hotel on October 16, 1970. It is also interesting to note that the purchase order is dated August 31, 1970 and indicates that the items listed thereon "have been received," and that the IID invoice is dated October 16, 1970. This is an example of an item being delivered to Westgate before a purchase order is issued and then billing deferred.

The court finds that the table was the property of Westgate on July 1, 1974. [687]

TWO TEAK FERN STANDS

Helen Smith claims as her personal property a pair of stands described in Exhibit 70, item 19, as "2 Teak Fern Stands." Supporting data is supplied in Exhibit 70A in the form of an invoice from David Chow showing 2 fern stands with marble tops, 10½ x 10½ x 30 inches high.

The stands claimed by Helen Smith were brought into court by Mr. Holding. It was obvious to the court that Helen Smith's supporting data did not match the actual items claimed. The stands belong to the Westgate Plaza Hotel, and Helen Smith's claim is false.

THE PAIR OF PIRANESI PRINTS

This item, number 29 on Exhibit 70, is claimed by Helen Smith on the basis of a "trade" for prints located in the Cuyamaca Club shown on Exhibit 12, item 5. These prints in the Cuyamaca Club have been shown to be etchings by Kashmir, that were bought and paid for by the U. S. National Bank (see Exhibit NNNN, item E). The court finds that Helen Smith's claim is false, and that the Piranesi Prints belonged to Westgate on July 1, 1974. [688]

THE GOLD LEAF MIRROR IN THE BORDEAUX ROOM

This mirror is claimed by Helen Smith as item no. 30 on Exhibit 70. It is also shown on Exhibit 39, page 4, and is described as being 58″ long and 41″ wide. Mrs. Smith claims in her supporting data that it was purchased from Ervis Thompson. The support data in Exhibit 70A simply does not support this claim. The same mirror is shown on Exhibit 28, item 35, and it is claimed on the basis of a trade for a mirror in Apartment 1900/1901. The mirror referred to in Apartment 1900/1901 was purchased at the Jean Owings auction and is not Helen Smith's property to trade. A careful examination of the claimed mirror in the Bordeaux room and a comparison with a partial photograph and verbal description of item number *295* in the Jean Owings catalogue (Exhibit GGG) reveals that the claimed mirror was also in fact purchased at the Jean Owings auction and is the property of the Westgate Hotel. The court finds that Mrs. Smith's claim for this item is false.

ONE ITALIAN PAINTING—CUYAMACA CLUB

Helen Smith claims one Italian painting acquired from Msgr. Travesone as her personal property on Exhibit 70, item 272. Mrs. Smith offers no supporting information, she simply claims this item, in effect saying, "It's mine, you prove it isn't." Exhibit NNNN, item A, proves that the claimed painting was purchased from the estate of Joseph Trivisonno by the U. S. National Bank or Westgage.

Again, the court finds that Helen Smith's claim is false; this painting is not her property. [689]

OTHER PAINTINGS IN THE CUYAMACA CLUB

On Exhibit 70, Helen Smith claims as her personal property items 273, 274, 275. These items are paintings located in the restaurant and bar area of the Westgate Executive Hotel. Again, Helen Smith simply makes the claim and presents no back up for items 273 and 274, and a copy of an invoice from the Century House Showing a purchase of a C. Detti painting for $375.00 for item 275. Exhibit NNNN, items B, C, and D, show that the Executive Hotel purchased eleven paintings for the restaurant and bar areas. IID invoices 66 and 124 indicate that Mrs. Smith invoiced item 275 twice, charging $350.00 each time.

The court finds that these claims by Helen Smith are false.

LOUIS PHILLIPE COCKTAIL TABLE— PUBLIC AREA

Helen Smith also claims item number 9 on Exhibit 70 as her personal property. This item is described as "Louis Phillipe Cocktail Table." Her back up data is non-existent, since Helen Smith claims that she brought the table from Tulsa. This item is shown on Exhibits 23 and 39 (Leona's lists) as being located in the Bordeaux Salon, and it is further identified thereon with IID number 1167. IID invoice number 117 shows that the Westgate Plaza Hotel purchased "1-ANA U-133 Small French MT Table" (No. 1167) for $500.00. The letters ANA were sometimes used to identify items purchased from A. N. Abel.

The court finds that Helen Smith is incorrect in claiming this item as her personal property and claiming that it came from Tulsa. It was the property of Westgate on July 1, 1974. [690]

PAIR OF LOUIS XVI TABLES, FLORAL INLAY

Helen Smith claims on Exhibit 28, Item 16, "One pr. Rosewood and Fruitwood Louis XVI Tables, floral inlay." This same item is claimed as number 13 on Exhibit 70. Its location is shown to be the Bordeaux Salon. Exhibits 23 and 39, Page 5 of each exhibit, show "2 inlay chests" purchased from George Georges. Also shown is Invoice Number 415, as well as a purchase order number 9076-02 and 03, plus two additional numbers, 512 and 513. Examination of IID invoice number 415 shows that the Westgate Plaza Hotel paid $1,104.00 for "2 inlay Marquetry Commodes" with the same identifying numbers 512 and 513, as well as "Your P. O. WP 9-0076." The invoice also carries the initials "GNG."

Helen Smith's supporting data in Exhibit 70A, Item 13, is an invoice from Angelo Gallichio showing the sale of "1 pair of Louis XVI tables for $600.00." This contradicts her previous assertion that George Georges was the supplier of this item.

The court finds that Helen Smith is mistaken in her claim for this item; it is not her personal property. It was the property of Westgate Plaza Hotel on July 1, 1974. [691]

PAIR OF WOODEN PEDESTALS— HOTEL PUBLIC AREA

A pair of wooden pedestals is claimed by Helen Smith on Exhibit 70, item 14. These pedestals are described on Exhibit 39 as "2 pedestals, wooden with cane centers." There is no other identifying data on that exhibit. In support of her claim for this item, Helen Smith presents no back up data in Exhibit 70A,

other than the advice that "duplicate original receipt will arrive before 2/27/76."

These items were brought into the courtroom during the closing days of the trial by Mr. Earl Holding. He had removed the heavy candelabras that were resting on the pedestals and discovered that identity tags still remained glued to the pedestals. The identifying information led directly to IID invoices that proved that the pair of pedestals had been purchased from Helen Smith by the Westgate Plaza Hotel.

Helen Smith's claim is false, and the pedestals were the property of Westgate on July 1, 1974. [692]
[693 Blank]

THE TAPESTRY ON THE HOTEL LOBBY'S NORTH WALL

Helen Smith claims a large tapestry that is located on the north wall of the Westgate Plaza Hotel lobby (See Exhibit 28, item 3). In her claim, Helen Smith identifies this tapestry as "One Tapestry (Beauvais)" that she acquired from Dr. Segall in Tulsa, Oklahoma.

Helen Smith has testified that she loaned the tapestry to the hotel for temporary use, and that it was her intention to retain ownership of the tapestry.

During the construction of the hotel, an expert craftsman was assigned to work with Helen Smith for the purpose of properly mounting the tapestry on the north wall of the lobby among other things. This man, Mr. Phillip R. Conard, was the building contractor's (Rhia Construction Company) project engineer for the Westgate Plaza Hotel project. He coordinated the lobby wall design with the interior design firm of Eggers

and Higgins in New York. Mr. Conard testified that the wall panel was designed to provide a certain dimension to accommodate the tapestry. Mr. Conard further testified that he designed and built a special backing and frame assembly to contain, secure, mount, and display the tapestry. This mounting assembly was carefully designed and constructed so that the tapestry could be properly laid out and stretched uniformly to avoid stress concentration points that would tear the fabric. In addition, it was designed so that the gravity load caused by the weight of the tapestry would not be borne by the tapestry fabric, but rather by the frame members that hold the tapestry in place.

After the tapestry was stretched out, secured, and the mounting assembly completed; the entire unit, measuring [694]

approximately 96″ x 90″, was lifted into place on the wall panel and secured to the wall by securing screws. Mr. Conard testified that to properly remove the tapestry from the wall, the entire unit would have to be removed from the wall and laid down horizontally and disassembled.

Westgate paid for the labor and materials to construct the entire assembly. The wall itself was designed to accept the assembly, a major component of some 8 feet by 7½ feet.

On the basis of the above testimony and the inspection by the court, it is the court's finding that the tapestry on the north wall of the hotel lobby is permanently installed and an integral part of the entire lobby wall decorating plan which includes, not only the wall panel and the tapestry, but also the surrounding objects of art that compliment them.

This court finds it difficult to believe that such an expenditure of time, effort, talent, material and money was made by the Westgate Plaza Hotel for the purpose of temporarily displaying a tapestry that it did not own and that could be removed on a whim.

As to the tapestry itself, there is no invoice in the original records of IID that were turned over to the court that describes a "Beauvais" tapestry. Supposedly, copies of all invoices issued by IID were turned over to the court and are contained in Exhibit 55. There was, however, a copy of an IID letter invoice, unnumbered, contained in a voucher package in the records of Westgate California Corporation (See Exhibit EEEEE). This letter invoice, dated July 18, 1968, contains a billing in the amount of $3,500.00 for "One French Beauvais Tapestry (with ladies in waiting, beiges, muted brown colors)." Helen Smith explained that this invoice is for a different tapestry, and not the one on the lobby's [695]

north wall, and further that its present location is unknown. There is no explanation offered concerning the absence of the letter invoice from the records of IID.

A Mr. Karubian, an antique shop owner from Hollywood, California, with degrees in geology, was called as an expert witness. He testified that the tapestry on the north wall of the lobby is not a Beauvais, but rather a tapestry from the Aubusson factory in France. Mr. Karubian explained that the tapestries made in the Aubusson area have a different thread spacing than the tapestries made at Beauvais, He further stated that the scene depicted is not of "ladies in waiting," but rather a mythical scene because of the presence of angels in the background.

The court examined the tapestry, and found that the "angels" referred to by Mr. Karubian are actually carved figures of cherubs astride a carved fish that appear as ornamental "capping" on the stone wall of a bathing, water fountain edifice. The fish's tail is curving upward, and the flukes of the tail can be mistaken as "wings" if the examiner is superficial and not attentive to detail. The court's impression, after detailed inspection, is that the predominant scene depicts three ladies situated in a wooded, open, outside setting involving a man-made, stone edifice that serves as a combination water fountain and bath. Water is flowing over the edge of a shell-like container in the background. Three scantly draped ladies are depicted in the foreground. One of the ladies is barefoot, reclining on overstuffed pillows and holding a harp. The second lady is shown bending over and serving a tray to the reclining lady. The third lady, behind a dressing table, is holding a mirror. The whole foreground scene is taking place on the edge of a [696] stone recessed bathing or washing area. The recessed area contains a large water pitcher plus a washing bowl and tray. Also, slightly behind the edge of the recessed washing area is an ornate dressing table that is partially covered by a ladies garment or robe that is draped over it.

This scene certainly conveys the idea that the one lady (the reclining one) is being treated royally, as if she were a goddess, and the other two ladies or angels are serving and waiting to serve her—thus, "ladies in waiting."

Counsel for Helen Smith urges the court to consider that the invoice of July 18, 1968 is in fact the invoice

that pertains to an English tapestry located in the Cuyamaca Club. This tapestry depicts an English scene. Further, counsel urges this court to believe that the invoice was prepared hurredly, and the descriptions were confused. Karubian testified that the English tapestry depicted a horseman and a "lady in waiting." A Xerox copy of the July 18, 1968, letter invoice that has been "tailored" to juxtapose phrases is presented for illustrative purposes. The court flatly rejects this argument. The court gives little weight to Mr. Karubian's testimony. His testimony was simply unbelievable, and his "expert" opinion based upon a superficial inspection is contrary to what the court can see and observe with its own eyes. The court is convinced that Mr. Karubian's testimony was carefully tailored to fit the juxtaposition on the "tailored" invoice.

Mrs. Smith's argument, based upon the tailored invoice, illustrates another more basic issue, i.e., the risks that are involved in the use of xerox copies as substantive evidence. It illustrates the ease with which a document can be altered and copied in such a way that the alteration is virtually undetectable on the resultant xerox copy. [697]

The court, based on all of the evidence, finds that the tapestry on the north wall of the hotel lobby is in fact the tapestry claimed by Helen Smith as the Beauvais tapestry and is the tapestry described in the July 18, 1968, IID letter invoice, approved for payment by Mr. C. A. Smith, that was paid for by Westgate Plaza Check Number 435, dated July 31, 1968. Therefore, the court finds that the tapestry on the north wall of the hotel lobby was the property of the Westgate Plaza Hotel on July 1, 1974, and

that it was permanently affixed to the lobby wall at that time and remains so today. [698]

[699 Blank]

THE KERMAN RUG IN THE LIVING ROOM—APT 1900/1901

Helen Smith claims two rugs in Apartment 1900/1901, one in the living room and one in the dining room (See Exhibits 60B and 60C).

The basis for Mrs. Smith's claim for the living room rug is that it was a gift from Mr. Smith. There was testimony from a Mrs. Thompson, a long time friend of Helen Smith's, that she had seen the claimed rug in the Smith's home in La Jolla before it was placed in the apartment. The rug is approximately 26 feet by 12 feet and obviously valuable. It is a Kerman and is similar to other large Kerman rugs in the hotel lobby.

Exhibit CCCCC is an inventory of IID invoices pertaining to the sale of Kerman rugs to the hotel. Exhibit 000-S, is an analysis of purchases from IID performed by the auditing firm of Arthur Anderson. There is no doubt that four, large, Kerman rugs were purchased by the hotel for a total price of $26,230.00.

The court is satisfied that Mr. and Mrs. Smith occupied Suite 1900/1901 prior to October 1973 on a cost-free basis, because the suite was designed and furnished, not only for their personal use, but also for the benefit of Westgate and other Smith-entities. The suite was to be used for hospitality and entertainment purposes. It was within the contemplation of Mr. and Mrs. Smith, and Helen Smith has so testified, that very important persons would use the suite—heads of state, etc. Certainly Westgate California Corporation

must have believed that the entertainment of such persons would inure to its benefit to have allowed the large investment of funds to custom build and furnish the suite. Helen Smith [700]

has testified that she had a home in La Jolla and did not really "live" in Apartment 1900/1901. She further testified that very important persons did use the suite.

On the basis of all of the evidence, including the misunderstandings Helen Smith manifested concerning other purported "gifts" from Mr. Smith, discussed elsewhere in these findings, this court finds that the Kerman rug was placed in Apartment 1900/1901 for the use and benefit of Westgate by Mr. and Mrs. Smith. If a gift of the rug had been made between Mr. and Mrs. Smith, that fact is not controlling as to its ownership on July 1, 1974.

There is ample evidence before the court to prove that Westgate paid for four Kerman rugs, each being approximately 12 feet by 26 feet. Three of these rugs have been accounted for, and one has been missing. Helen Smith sold each of the four rugs to the hotel. Helen Smith decided where the rugs were to be placed. Helen Smith placed four large Kerman rugs in the hotel.

The Kerman rug in Apartment 1900/1901 was placed there from the beginning, long before the apartment was occupied under any color of lease. It was intended to be an integral part of the apartment and its decor. It was installed by Westgate personnel. The apartment was not Helen Smith's home. The entire apartment and its furnishings were to serve as a hospitality suit for Westgate. Helen Smith was Westgate's decorator. Helen Smith has sold her own personal property to Westgate. Westgate paid approximately $6,500.00 for a Kerman rug that is unaccounted for.

This court finds on the above facts, that the Kerman rug in the living room of Apartment 1900/1901 was in fact the property of the Westgate on July 1, 1974, and that the "missing" Kerman rug is now accounted for. [701]

[702 Blank]

THE PERSIAN RUG IN DINING ROOM— APARTMENT 1900/1901

On Exhibit 60C, Helen Smith claims a "Persian rug." In support of this claim, Helen Smith offers a Bill of Sale from Virginia McLaughlin, dated February 27, 1964. It lists some 18 items for a total cost of $9,725.00. Item 18 is "Miscellaneous—paintings, rugs. . . ." etc. Item 18 concerns the rug in question. The description is not very helpful. The price of 2,600.00 paid for Item 18 is not of much help either. The rugs, paintings, books, figurines, and other miscellaneous things on Item 18 are all lumped together for this one price. Also, note that this Bill of Sale shows Item 17, "Original French Andiron Set" with a note written by hand, "Apt. 1." This was the original designation for Apartment 1900/1901. This same Bill of Sale was used as supporting data for the living room Andirons (Exhibit 60B, Item 21) that were in fact purchased at the Jean Owings auction. This Bill of Sale must, therefore, be considered unreliable as supporting data for this claim.

Exhibit 000-S shows that the Westgate Plaza Hotel purchased 13 "oriental" rugs from Helen Smith. The

receiver's inventory of rugs in the hotel (not counting the Apartment 1900/1901) shows a total on-hand of ten. Since one of the missing Kerman rugs has been accounted for above, this leaves two still unaccounted for. This exhibit also shows a check requisition from C. A. Smith for a $1,350.00 check to be paid to Kalee Peres for an oriental rug for the Plaza Hotel, and it is dated May 26, 1969, and marked "Rush." On May 28, 1969, a similar check requisition, in the amount of $800.00, is also signed by C. A. Smith. The payee is again Kalee Peres for a hotel purchase—no detail is given [703]

concerning the identity of the item. This rug, purchased directly for the hotel by C. A. Smith is not included in the 13 rugs purchased from Helen Smith.

This means that there are now three oriental rugs purchased for the hotel by either Helen Smith or C. A. Smith that are still unaccounted for.

The dining room rug was installed in Apartment 1900/1901 under the same circumstances as discussed earlier concerning the living room rug.

Mrs. Georgia Blatz, a friend of Helen Smith of long standing, testified that she had seen the dining room rug in Helen Smith's Los Angeles Apartment in the Doheny Plaza. This testimony shows that Helen Smith had the rug in her possession before it was placed in the apartment.

The court has earlier discussed the reasons for its findings that the apartment and its contents existed primarily for the benefit of Westgate California Corporation.

There has been much testimony concerning the differences between the descriptions "Kerman" and "Persian." The court is satisfied that each is synonymous with the more general and widely used description "oriental" when used in conjunction with the word "rug." Hence, the court finds that a Persian rug can fairly be called an "oriental rug"; and similarly, a "Kerman rug" can also be called an "oriental rug."

Since the oriental rug purchased by C. A. Smith from Kalee Peres was purchased in May 1969 and the hotel was not completed until August 1970, and the apartment not until 1972, the rug had to be located somewhere and in the care, custody, and control of Mr. and Mrs. Smith. Helen Smith used her Doheny Plaza apartment to store valuable items she purchased for resale to Westgate. Many items used in the Westgate hotels were picked up at the Doheny Plaza for delivery to the [704]

hotels (See testimony of Donathan, Helen Smith, and Hilda Edmunds).

Mrs. Blatz volunteered an interesting comment while testifying about the rug on page 2830 of Transcript, Vol. XXII. She testified as follows:

> "Q. And you had an occasion to observe it in the Doheny Plaza Bedroom?
>
> A. Yes, because I wanted . . . I thought it would be very nice in my house, if she wanted to get rid of it, I was going to store it for her.
>
> THE COURT: On the floor?
>
> THE WITNESS: Uh, huh, flat."

This comment suggests to this court that Mrs. Blatz associated that rug with the concept of one person storing another persons property by using that property himself.

The court is not convinced that the Virginia McLaughlin Bill of Sale supports Helen Smith's claim for the Persian rug.

This court therefore finds, after weighing all of the evidence and the inferences that can be drawn therefrom, that it is much more likely that the Persian rug in the dining room of Apartment 1900/1901 is the rug purchased for Westgate by C. A. Smith in May, 1969, from Kalee Peres, and that it was stored by being used in the Doheny Plaza Apartment, where it was seen and commented on by Mrs. Blatz, and it was then brought to the Westgate Plaza Hotel and put in place in the Westgate-owned Apartment 1900/1901, than it having come from Virginia McLaughlin as one of many non-descript items lumped together under "miscellaneous."

The court finds that the Persian rug was the property of Westgate on July 1, 1974. [705]

[706 Blank]

THE DINING ROOM SUITE— APARTMENT 1900/1901

Helen Smith claims ownership of a 13-piece dining room suite located in Apartment 1900/1901 (Exhibit 60C, Item 15). The source of acquisition is described as, "Trade for 18th Century 21 piece Chippendale Dining Room Suite to USNB and Westgate for this set and other items." The supporting data, (Exhibit 61) contains a reference, "original invoice in 55E." This refers to Exhibit 55E, the file of original IID invoices that were issued during the year 1972. Exhibit 55E was examined, and IID Invoice Number 945 was located. This invoice is directed to the Westgate Plaza Hotel, and it recites charges for labor to re-upholster

12 chairs (10 straight back plus 2 arm chairs) in the amount of $269.33. The invoice also indicates that the fabric used was the hotel's property. The invoice further recites that Helen Smith is "loaning" the chairs to the hotel for use in "Dining Room of Apt. 1." There is no mention of the table or the two sideboards that are major items.

Also claimed as item 15A is a pair of French arm chairs acquired from Joe DeWitt. An invoice from DeWitt dated in April, 1972 is used to support this claim. This invoice is shown on Exhibit 61C, item 15A.

Helen Smith initially testified to the "trade" involved and to the location of the traded Chippendale Dining Room Suite. She said that it was at the former Mission Bank, later a branch of the former USNB, and was being used in a conference room there.

Helen Smith again testified (See Transcript, Vol. XXVI, Pages 3548-3553) concerning the dining room set. She identified Exhibit 71 as an invoice from Ames Art Gallery that describes a 13 piece Dining Ensemble, plus 2 arm chairs. [707]

The invoice is dated "2/1/67." Helen Smith explained further that in her prior testimony and back up claims, she was confused and had forgotten that she had not sold this set, because it was stored behind the chain link fence in the bank warehouse at 33rd and El Cajon, since it was purchased from Ames in 1967.

The Ames invoice shows a 13 piece dining room ensemble, plus 2 arm chairs. The DeWitt invoice shows 2 arm chairs. Neither mentiones the sideboards that are in a class by themselves. It is this court's belief that the Ames invoice does not clear up the confusion.

Richard Hovland, the bank warehouseman, has testified inversely to Helen Smith's assertions. He stated that a large table from the board room of the Mission Bank (then a USNB branch) had been taken to Helen Smith's house in Rancho Santa Fe (See Exhibit KKKK). He testified that he thought that he had seen it at the house in Rancho Santa Fe and so had Mr. Brewster. Mr. Hovland then said he knew it was delivered there (See Transcript, Vol. XXVI, Pages 3591-3594 and 3617). This testimony certainly indicates that at least one-half of a trade had taken place between the USNB and Helen Smith. While this is not corroborative of Helen Smith's original explanation, it at least indicates that she did have experience with a large table and the Mission Bank.

Richard Hovland further testified that he had recently examined the dining room set in Apartment 1900/1901. He stated that the set was the same set that had been in his custody at the bank warehouse at 33rd Street and El Cajon Blvd., and before that in the "old" U. S. National Bank Building (Transcript, Vol. XXVI, Pages 3598-3601). [708]

Mr. Hovland said that the dining room set was moved from the old U. S. National Bank building to the bank warehouse at 33rd and El Cajon Blvd. when the old USNB building was torn down. He listed the dining room set on his warehouse inventory as Westgate's property. In addition, he said that the area enclosed by the chain link fence contained only personal property of C. A. Smith and his son, and that he never included any of that property on his inventory lists (See Transcript, Vol. XXVI, Page 3630 and 3631). Mr. Hovland then identified the dining room

set on an inventory list of Westgate and Bank items at the 33rd Street warehouse (Exhibit HHHH). He states that Mr. Jack Donathan had picked up the dining room set from the warehouse and taken it to the Plaza Hotel basement on October 16, 1969 (See Exhibit HHHH).

Mr. Harry Humphreys, chief of security for Westgate Plaza Hotel, testified that the "old" U. S. National Bank building was torn down in 1964 after the high rise bank building was completed (See Transcript, Vol. XXVI, Page 3633).

The court was impressed with Mr. Hovland's straightforward testimony. He impressed the court as being a dedicated person who treated his task as a custodian of other people's property very seriously. He made very effort to protect that property and methodically accounted for its movements. The court gives full credit to his testimony and finds that Helen Smith's claim that the dining room set in the apartment is the same one that she purchased from Ames is not correct, because the claimed set had been in Mr. Hovland's custody for at least two years prior to the Ames purchase. The dining room set presently located in Apartment 1900/1901 was the property of Westgate on July 1, 1974. [709]

[710] Blank

DISCUSSION OF THE ERARD PIANO

There is an unusual, antique piano located in Apartment 1900/1901 that is being claimed by Mrs. Smith. Mrs. Smith's claim is based upon her belief that the piano was purchased by Mr. C. A. Smith with his own personal funds, and that he purchased the piano as a gift to her to commemorate an important occasion.

The evidence shows that the piano was initially purchased in New Orleans, and that Westgate paid the shipping costs to San Diego and the expenses involved in special handling to place the piano in Apartment 1900/1901.

In Mrs. Smith's claims list (Exhibit 6, 60B), she describes the piano as a "Sparad Piano". An invoice from International Interior Designs, Number 804, was sent to Westgate Plaza Hotel, c/o Hotel Services on November 15, 1971. This invoice refers to Westgate Plaza Hotel Purchase Order WP 750. The subject of the invoice is "one Satinwood and Rosewood Erard Grand Piano" for a total price of $11,550.00.

The original of invoice 804 produced by International Interior Designs (Exhibit 55D), dated November 15, 1971, and initialed by Helen Smith, was the final invoice on the Erard piano, and it was paid by Westgate.

Prior to this invoice being submitted to the Westgate Plaza Hotel, IID Invoice Number 792, dated October 15, 1971, was prepared and directed to C. A. Smith, c/o USNB for, "1 Satinwood and Rosewood Piano (signed by Erard)" for a total price of $11,550.00. This original invoice in the IID records carries on its face some unusual markings. First, there is a thin lined "X" in red ink through the information area of the document; second, there is a handwritten notation in red ink,[711]

"Cancelled October 31"; third, there is a white substance painted over the handwritten notation, as well as the "(signed by Erard)" portion of the description of the piano.

Subsequent to Invoice 804 being submitted to Westgate, but at a date unknown; an unnumbered invoice with the number 804 typed in was prepared, and on its face it describes a Steinway grand piano for the price of $11,550.00. The date on the invoice is November 15, 1971, and it purports to be a superseding invoice claiming that the previous 804 was incorrect in calling the piano an "Erard" instead of a "Steinway." The price of $11,550 remained the same. The Westgate voucher package for IID invoice 804 does not contain the "superseding" 804 invoice.

Further information on the Steinway piano can be found on IID Invoice No. 957, dated June 16, 1972. On this invoice the Westgate Plaza Hotel is billed for cartage and insurance on the Steinway, with the further characterization of the Steinway piano as being "on loan" from Mrs. Smith. There is only one Steinway piano in the Westgate Plaza Hotel, and IID records show that the Steinway piano cost $2,500.00, plus $1,275.25 for cartage and rebuilding. It is shown as an IID inventory item on Exhibit 34 and on Exhibit 62.

Mrs. Smith further testified that the IID invoice, Number 804, for the Erard piano was actually for a different piano, i.e., the Steinway. The piano she claims in Apartment 1900/1901 is claimed as a "Sparard" and not an "Erard" and she insisted that it was a Sparad piano, not an Erad, not a Steinway.

The court examined the piano and finds that without a doubt it is an Erard piano. Further, the court finds that the explanation offered by Mrs. Smith and her insistence that the Erard is a "Sparad" is not credible. She knew in fact that [712]

IID had paid $10,000.00 for the Erard piano by means of two checks, each containing a reference to the Erard Satinwood and Rosewood piano (See Exhibit 61B)—Mrs. Smith herself signed one of the checks under her previous name, M. H. Alvarez. A Xerox copy of these checks is also shown in Exhibit 6B, and it is noted that the copies of the two checks have been altered to show a "Sparad" piano. This, coupled with the obvious attempts to alter the original of invoice number 792 so that a Xerox copy would show an invoice for "1 Satinwood and Rosewood Piano" directed to Mr. C. A. Smith and then duplicate 804 invoice purporting to supersede the original 804 invoice initialed by her, amounts to a premeditated, calculated plan designed to deceive the court and to deprive the true owner of his lawfully acquired property.

The court finds that the IID invoice to Mr. C. A. Smith was cancelled by IID, and that Mr. Smith never intended to pay for the Erard piano; that a Westgate Plaza Hotel purchase order was issued for the Erard piano; that the purchase order for the Erard was honored by IID; that IID invoiced the Erard piano with Helen Smith's approval; that Westgate paid for the Erard piano; that Mrs. Smith had the Erard piano delivered to the living room of Apartment 1900/1901; that she at all times knew the piano to be an Erard; and that she billed Westgate Plaza Hotel for the special handling and moving of the Erard piano. Helen Smith knew that the Steinway piano was worth only $3,775.-00; that it was never "billed" to Westgate; and that it was delivered to Westgate "on loan" (the significance of Mrs. Smith's use of the word "loan" and its meaning to her and Westgate has been discussed). The court further finds that there was no gift of the piano in-

volved, and that the Erard piano now in the living room of Apartment 1900/1901 was the property of the Westgate Plaza Hotel on July 1, 1974, immediately prior to the sale of the hotel and its contents [713]. to California Little America Corporation (See Exhibit 00).

Finally, counsel for Mrs. Smith argues that Mr. Smith was "The *boss*" of Westgate. On that point, this court is in full agreement. Counsel then goes further and argues that "The boss" in effect said, "I say it's her piano."; therefore, the Erard piano became Mrs. Smith's property. There is a short answer to this theory. Mr. Smith knew, as the chief executive officer of a publicly held corporation, that he was legally precluded from making gifts of corporate assets to members of his family without approval of the corporation. Mr. Smith was "on notice" as to this restriction and limitation on his power to give away corporate assets. Mr. Philip Toft has testified that a person had once complained to him that items of furniture, Westgate corporate assets, were being delivered to Mr. Smith's daughter's home. He told Mr. Smith that if this was being done, then he, Mr. Smith, would have to pay Westgate for the items so delivered. Mr. Toft further testified that the items were shortly thereafter returned to Westgate from the Carol Shannon Smith residence (See Mr. Toft's Deposition, Page 46). Toft's testimony has been corroborated by Mr. Hovland and Mr. Donathan to the extent that they knew that Westgate property had been delivered to Carol S. Smith's home, and that it was later returned.

It thus becomes clear to this court that Mr. and Mrs. Smith had difficulty in understanding that there were, and are, limits to the authority of "The Boss"

to deal with assets that belonged to the corporation; and that everything that was owned by the corporation *did not* belong to "The boss." This failure in understanding lies at the heart of this dispute. [714]

[715 Blank]

HELEN SMITH'S CLAIMS BASED UPON THE PRESUMPTION OF OWNERSHIP

Helen Smith has also based her ownership of the claimed items on the presumption of ownership that arises from the possession of property. This presumption is based upon California Law and is applicable to the civil proceedings here (See Federal Rules of Evidence, 301 and 302).

California Evidence Code, Section 634, provides that, "the things which a person possesses are presumed to be owned by him." There can be no disputing the fact that on July 1, 1974, Helen Smith was in actual possession of Apartment 1900/1901 and its contents. She and her husband had the keys. Likewise, there can be no disputing the fact that Helen Smith had actual possession of the "sub-basement" and its contents and the G. Street locker. She had her locks on the doors.

Helen Smith did not have actual possession of the items that she claims in the Cuyamaca Club, the Executive House, and the public areas of the Westgate Plaza Hotel.

The presumption of ownership that arises from actual possession is not, however, the only presumption that applies to the facts of this case. When items are intentionally co-mingled, other presumptions and law come into play.

Bernard Witkin, in his summary of California Law, 3 Witkin 1684, teaches that "when goods owned by different persons are intermingled so that separate interests cannot be ascertained, there is a confusion of goods. * * * if the confusion is wilful, the innocent takes the whole without obligation to compensate. (*Lightner Mining v. Lane*, (1911) 161 Cal. 689, 708)." See also *Accession and Confusion 1 Am. Jr. 2d*, §15, pg. 285, 286, and "Confusion of Goods" *15A C.J.S. 548*. [716]

All of the testimony of the witnesses, coupled with the volumes of documentary evidence, discussed at some length earlier in these findings, satisfy this court that there is one basic fact that cannot be overlooked, suppressed, or explained away, that puts the presumptions in the proper perspective. This fact is, and the court has found, that Helen Smith was solely responsible for the placement, moving and storage of *all* of the items in dispute, as well as the balance of the items she sold to Westgate on the Westgate premises. If she now claims ownership of some, and not of all, then it is clear that she intentionally co-mingled her property with the property of the entity she was pledged to serve. Confusion resulted to the point that she cannot now point to any item and identity it with undisputed certainty or produce records that apply to that very same item with equal certainty. The confusion of goods is manifest in every area where claimed furniture is located.

This court, therefore, finds that whether Helen Smith claims to have actual possession under color of lease or otherwise, her conduct in intentionally co-mingling and confusing her property with that property she sold to Westgate deprives her of the benefit of the

presumption of ownership based upon her possession of the Westgate-owned premises. Helen Smith placed, co-mingled, and confused items she may have owned personally, with those items owned by Westgate. [717]
[718 Blank]

THE CREDITED ITEMS

The French commode in the living room of Apartment 1900/1901 (Exhibit 60B, Item 13), the Louis XV desk sold to the Cuyamaca Club (Exhibit 33, Item 1079), and the Louis XV Bureau Plat in the office of Apartment 1900/1901 (Exhibit 60G, Item 21) were all sold to Westgate. IID invoices in Exhibit 55 exist to prove it. This fact is admitted by Helen Smith, but he bases her claims on "credit memos." There are no credit memos in Exhibit 55 for these three items, nor are they contained in the files of the Westgate Plaza Hotel or Cuyamaca Club. The books of IID "accounts receivable" show no such credits (Exhibit 56). The items supposedly credited do not appear on the IID inventory records (Exhibit AA) that were completed in 1973, according to Hilda Edmunds. When these problems were shown during the trial, Hilda Edmunds and Helen Smith explained that the three "credit memos" were not processed, because they were lost in a mountain of paper. Exhibit 58 was introduced to show that the items were indeed "credited", but not until December of 1973, and even then the "credits" were mistakenly put into the General Journal rather than the "accounts receivable." There was no explanation, however, of the fact that the original credit memos were never received by Westgate, nor was there any explanation of the fact that the items did not appear on Exhibit AA before the problem with the "credits" was made known. The

"Proof of Claims" filed by Mrs. Smith in the Bankruptcy Court does not reflect the "credit" either (See Exhibits FF, GG and HH).

It is also noted that other credit memos issued in October and November, 1973, were issued and recorded in the "accounts receivable" section of IID's books. Please see [719]

the accounts receivable section of Exhibit 57 that reflect the "crediting back" of Spyka paintings previously sold to the Cuyamaca Club on IID Invoice 1198, pursuant to a credit memo issued on October 31, 1973; as well as a clock set sold on Invoice 1443, pursuant to a credit memo issued (but not located in Exhibit 55) on November 5, 1973. These bookkeeping transactions prove that the IID bookkeeper knew that this was the proper account in which to record such transactions. The same accounts show similar transfers from USNB to Cuyamaca Club. This court is satisfied that Mrs. Smith and her bookkeeper, Hilda Edmunds, knew exactly what they were dong; and that there was no confusion or misunderstanding as to the proper bookkeeping procedures and the handling of "credit memos". On the basis of the above findings, coupled with the cautionary note to Mr. O'Sullivan, Helen Smith's tax attorney, accompanying the entries of credits in the General Journal (Exhibit 58), this court further finds that the final entries in the IID General Journal (Exhibit 57) were not made until long after the date on the alleged "credit memos", and that Helen Smith had reason to believe that these entries were not accurate or correct.

It is the finding of this court that Helen Smith's attempt to acquire Westgate's property by means of

these belated "credit memos" was completely ineffective. The credit memos were never sent out to Westgate in either October, November, or December, 1973, or at any time prior to February 26, 1974. Mr. Smith may have told Helen Smith to "credit" these items as she has testified; but this direction on the brink of his departure from Westgate, and within four months of bankruptcy, was not sufficient in fact or law to strip Westgate of its legal ownership of these items. [720]

It is the finding of this court that each of the items listed in Exhibits 60B, 33 and 60G, as "credited back" to IID was the property of Westgate on July 1, 1974.

As to those items on Exhibit 70, the Spyka paintings, that were the subject of the properly recorded IID credit memos, the court finds that these also were unaffected. The dates on the credit memos are clearly within the four month period, immediately prior to February 26, 1974, Westgate's bankruptcy date; and therefore the purported transfer constitutes a preference under the bankruptcy law (Section 60 of the Bankruptcy Act); and as such it has been set aside by the Trustee in Bankruptcy. The Spyka paintings are the property of the Cuyamaca Club.

Helen Smith's attorney has argued that the preference provisions of Section 60 do not apply, because the "executed oral modification" of the lease agreement takes these transactions out of the preference category (See written argument of Attorney Engstrand). The facts simply do not support this theory. In substance, Mr. Engstrand argues that Helen Smith's promise to Westgate to continue to supply items to the Cuyamaca

Club in late October 1973, when she had knowledge of the financial condition of Westgate, and her supplying of furnishings and fixtures thereafter, coupled with the acceptance by Westgate of furnishings and fixtures, constitutes an executed oral modification of the lease agreement and removes the issue of preferential transfer. He cites Section 60(c) of the Bankruptcy Act as authority.

In examining this argument, the court has reviewed the IID invoices issued to Westage or its subsidiaries after the date of the alleged oral modification of the lease. The court finds that from October 31, 1973 through the end of [721]

December, there were only six IID invoices issued to Westgate or Smith-entities. Five went to the Cuyamaca Club and one to the USNB. These invoices show that the materials and labor furnished had *already* been supplied at the time of the alleged oral agreement and clearly were "in place" in the club and bank buildings.

In addition, the court finds that Helen Smith's actions, in "crediting back" Westgate items worth approximately $13,000.00 during the same period, are not consistent with the "good faith giving of further credit" provision of Section 60(c).

In addition, Helen Smith was already bound by her previous promises (Exhibits 1 and 2) and did nothing more than she was already obligated to do.

And, finally, the court in an earlier section of these findings has found that there was no "executed oral modification of a prior written agreement."

The court must conclude, therefore, that this argument has no basis in fact to support it. [722]

[723 Blank]

HELEN SMITH CLAIMS— PERSONAL PROPERTY (HSP)

Helen Smith claims items on the ground that they are her personal property (HSP) and not included in the IID inventory. From all of the foregoing discussion of the facts found by the court concerning incorrect claims, wrong information, confusion of names and identities of the items, confusion of goods, and co-mingling of property, the short answer would be to deny the claims at this point.

The court, however, has carefully evaluated each of the claims and its supporting data and made individual factual findings as to each item claimed. The detail of such evaluation will not be included here, but the following factors, as shown by the evidence, were included in the factual analysis:

(1) The failure of Helen Smith to produce her personal books for the major period of time during which the claimed items were acquired or held. Helen Smith testified that she kept an inventory describing each of the personal items claimed in her personal books and records. These books and records were not produced, despite the court's order to do so. Helen Smith said that she had misplaced them. As to the records in her personal books that were produced, See Exhibit DDDD, the records are not persuasive, since they show signs of erasures and compression of data.

(2) The use of specific supporting material that was shown to have been incorrectly used to claim other items. [724]

(3) The identity of the source of acquisition.

(4) The mode of acquisition (purchase, gift, souvenir, etc.)

(5) The value of the item versus the mode of acquisition and the supporting information.

(6) The use to which the item was put.

(7) The light of human experience and common sense. [725]

EXHIBIT 60—APARTMENT 1900/1901

This listing represents the results of the court's findings of fact based upon the integration of all testimony, documents, and the light of human experience. All of the items listed are found by the court to be items that are the personal property of Helen Smith. The items are not listed were those items that the court has found to be the property of Westgate on the basis of the claims not being supported by reliable data, or any data at all, or inconsistent data; or the items being described on documents reflecting the sale of the item to Westgate; or the items having been delivered to Westgate for its use and benefit.

EXHIBIT 60(A)—ENTRY FOYER

Items 8 and 10

EXHIBIT 60(B)—LIVING ROOM

Items 3, 20, 22, 23, 24, 26

EXHIBIT 60(C)—DINING ROOM

Items 7, 8, 9, 10, 11, 16

EXHIBIT 60(D)—MASTER BEDROOM

Items 18, 27, 28, 31, 32, 40

EXHIBIT 60(F)—OFFICE

Items 6, 8, 15, 21, 22

EXHIBIT 60(G)—SMALL BEDROOM

Item 4

EXHIBIT 60(H)—ROOF

Items 1 and 2 [726]

EXHIBIT 70 (EXHIBIT 33)—SUB-BASEMENT

The court finds that the following listed items are the property of Helen Smith. The findings are made on the same basis as the Exhiobit 60 series:

37, 41, 42, 55, 65, 66, 67, 70, 82, 88, 89, 91, 92, 93, 97, 98, 99, 102, 103, 104, 105, 113, 117, 118, 122, 123, 125, 126, 133, 134, 135, 137, 139, 141, 142, 143, 145, 146, 149, 150, 151, 154, 156, 157, 158, 159, 160, 161, 162, 163, 166, 167, 168, 176, 177, 179, 180, 183, 187, 188, 196, 200, 203, 206, 213, 214, 215, 220, 223, 225, 229, 233, 236, 239, 240, 246, 248, 249, 253, 254, 260, 262, 263, 264, 265, 267, 268, 269, 318, 319, 320, 321, 325, 326 [727]

EXHIBIT 70—PUBLIC AREAS OF WESTGATE HOTEL AND CUYAMACA CLUB

The court has examined numerous items that are claimed in the public areas of the Westgate Hotel and the Cuyamaca Club (See earlier findings on individual items) and has found that the claims on the basis of "loans" are not well founded and that the supporting data was incorrect. The court has carefully examined the supporting data for the remaining

items being claimed, compared the IID invoices (Exhibit 55) and the correlation of claims to invoices in Exhibit IIIII, and finds that the supporting data offered by Helen Smith is simply not sufficient to show that she did not deliver these items and place them in precise locations pursuant to her obligation to decorate the hotel and club with the intent to permanently convey the items to Westgate for its use and benefit.

Therefore, the court finds that each of the items on Exhibit 70 that is claimed from the public areas of the Westgate Plaza Hotel and the Cuyamaca Club was the property of Westgate on July 1, 1974. [728]

EXHIBIT 52—G STREET LOCKER

This exhibit was examined, and the court finds that the items claimed thereon that are not marked "N.C.", or are not listed on Exhibit 53, or were purchased at the Jean Owings auction, or are traded items with the USNB are Mrs. Smith's personal property and should be returned to her in conformance with this finding. [729]

[730 Blank]

CREDIBILITY COMMENTS

This court has spent many hours hearing oral testimony, observing the demeanor of each live witness, evaluating the written statements and responses of key witnesses who were unable to testify in the presence of the court, studying hundreds of documents, and inspecting "on site" the individual items and areas in controversy.

In the final analysis, this court finds that the seeds for the instant disputes were planted the moment the

Letter of Agreement (Exhibit 1) was signed by C. A. Smith. That document was drafted in such terms that it enabled Helen Hill to express her artistic talents through the acquisition of fine antiques and things of beauty with little or no cost restraint. While the Letter of Agreement provides for supervision of Helen Hill by one Herb Williams, this was a restraint in form only; and this court has been unable to find a single instance in which Herb Williams exercised his supervisory power to deny Helen Hill. In July 1968, when Helen Hill became Mrs. C. A. Smith, wife of the chief executive of Westgate, all responsibility to restrain Helen Smith's exercise of her talents passed in fact to Mr. C. A. Smith. He joined her in acquiring the antiques and art objects for the realization of her concept and vision of the Westgate Plaza Hotel a la Place at Versailles. It is not too difficult to understand, in the light of human experience, the relationship that soon developed between Helen Smith and all of the Westgate personnel. Even though Helen Smith did not serve as an officer or director of Westgate and her name never appeared on the organizational charts, she exercised management functions and was in fact the chief executive in charge of furnishing and decorating for Westgate. In her own mind, Helen Smith [731]

considered herself as much a part of Westgate as Mr. Smith did. Her business identity, IID, existed simply as a bookeeping conduit between the suppliers and Westgate for the sole purpose of enabling Helen Smith to purchase as a "dealer", at dealer prices, without sales tax liability. The ambiguity of the Letter of Agreement concerning selling prices to Westgate allowed Helen Smith to determine the "mark up" to be charged

without any real pricing formula or control by Westgate. Helen Smith was thus able to realize financial rewards for her efforts. Helen Smith was able to function without the normal checks and controls that are associated with specifying, requesting, justifying, purchasing, receiving, and accounting for items purchased by Westgate. This situation existed, not only because these normally separate functions were concentrated under her control, but also because she was Mrs. Smith. Her identity, in fact, merged with that of her Husband, C. A. Smith, in the minds of all Westgate employees. The hotels were built and decorated and are truly a reflection of the Palace at Versailles. Helen Smith's relationship with Westgate continued until Mr. Smith's financial world crumbled, and he was forced to resign from Westgate. Mr. and Mrs. Smith retained a foothold on the Westgate properties through the lease agreement after Mr. Smith's resignation.

Just as Marie Antoinette could not believe that the people were starving, Helen Smith can not now believe that the antiques and objects of art that she searched for, purchased, installed, and delivered to the Westgate properties are not her property.

This misconception of legal ownership is the flowering of the seeds of misunderstanding that were planted in 1967 and nurtured by C. A. Smith up to the present time. [732]

As a consequence, Helen Smith was driven to desperate measures in her effort to reclaim for herself these treasured items that she used to create the world of the French Kings and their ladies for the Westgate California Corporation.

The evidence in this case clearly shows that Helen Smith did not really understand the role she played

for Westgate. She believes that she owns all of the items claimed. She was aware of the problems her methods of purchasing antiques created for Westgate's accountants; but she felt that all she had to do was to claim the item, and it would be returned. When the new management team at Westgate refused her demands, Helen Smith reacted by compiling records to support her claims and has pressed them with vigor and industry.

The court has heard Helen Smith explain and re-explain; has seen and heard Helen Smith's bookkeeper, Hilda Edmunds, resist examination and explain at the direction of the court. Obvious alterations were detected in documents, but Helen Smith persisted in attempts to support her claims on the basis of the altered documents. The court has heard from witnesses who were obviously loyal friends or former Westgate employees who worked for Helen Smith. Each witness's testimony was founded on what Helen Smith had told them herself on prior occasions and not on their independently acquired knowledge.

Two of Helen Smith's vendors were called to testify concerning specific items. Their testimony simply was not convincing on the major points they sought to clarify and was in conflict with other evidence.

Mr. Smith and Mr. Toft have been convicted of multiple felony offenses, and the court disbelieves their written statements. Helen Smith has been impeached by her own [733]

documentation, as well as by her own inconsistent testimony on major items in dispute.

This court finds that Helen Smith's testimony, the documentation she supplied, and that documentation

she has failed to supply was designed to create a false impression of the facts; that this design was conceived out of desperation on Helen Smith's part to justify what she, in her distorted view of her relationship with Westgate and its property, sincerely believes to be her due.

This court, after careful and thoughtful deliberation, finds that Helen Smith's evidence is in large part unworthy of belief.

Based upon all of the foregoing findings of fact and conclusions of law,

IT IS HEREBY RECOMMENDED that judgment be entered accordingly.

DATED this 15th day of April, 1976.

/s/ Harry R. McCue
HARRY R. McCUE
United States Magistrate

[734]

APPENDIX B.

Memorandum Decision and Order.

United States District Court, Southern District of California.

Federal Deposit Insurance Corporation, as Receiver of United States National Bank, Plaintiff, v. Westgate Plaza, a California corporation, et al., Defendants. Civil No. 74-50-E.

California Little America Co., a corporation, et al., Plaintiffs, v. Helen Smith, Defendant. Civil No. 74-576-E.

Upon duly considering the oral argument of counsel on April 30, 1976 and upon duly considering all the written materials filed in support of and in supplement to said oral argument the court does hereby adopt, in their entirety, the findings of fact and conclusions of law prepared by Magistrate Harry R. McCue and filed with the court on April 15, 1976.

Before stating the basis for this adoption, some discussion of the reference of this action to Magistrate McCue is in order. In May 1975 trial commenced in this court in action [1082]

No. 74-50-E and continued intermittently for several days. When it appeared to the court that the substantial criminal calendar in this district would preclude a rapid and orderly determination of the complex issues in the action, the court referred this matter to the magistrate. On June 27, 1975 the court entered an order appointing Magistrate McCue to conduct pretrial and discovery proceedings and all other matters in dispute. In that regard the magistrate was instructed to hear evidence and to prepare findings of fact and

conclusions of law when appropriate. The intention of the court and the magistrate and the conduct of the parties throughout the entire proceedings and prolonged evidentiary hearings convincingly supports the conclusion that Magistrate McCue was acting as a special master, as contemplated by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 53.

The trial continued before Magistrate McCue for 34 trial days. A substantial amount of testimony and documentary evidence was introduced. Findings of fact and conclusions of law, adverse to the interests of Mrs. Smith, were filed by the magistrate on April 15, 1976. Only thereafter did her counsel object to the magistrate's capacity to make those findings and conclusions as a special master. The transcripts of proceedings and pleadings on file are replete with refutation of this contention. Ironically, it was Mrs. Smith's initial counsel, Mr. Fisch, who proposed the appointment of a special master on June 26, 1975, one day before said appointment was made. (R.T. p. 870, lines 5-10). Mr. Bowles and Mr. Stechel, representing the other two parties to the action at that time, also contemplated the appointment of a special master. (Transcript of July 16, 1975 conference, p. 3, lines 23-28). Both the court, through its order, and Magistrate McCue, through statements to the parties, advised [1083]

the parties that the magistrate would hear evidence, resolve issues in dispute and make findings of fact and conclusions of law for final review by the court. Finally, on February 13, 1976 Mr. Engstrand, Mrs. Smith's present counsel, moved for the consolidation of the unlawful detainer action, No. 74-576-E, with

the main action for the purpose of taking evidence in each case. (Minutes of proceedings before Magistrate McCue, February 13, 1976).

The court will not sustain Mrs. Smith's contention at this late date, upon an adverse ruling from the magistrate, that the magistrate did not have the capacity to act as a special master—to hear evidence and to file findings of fact and conclusions of law with the court.

The findings of fact of a special master are subject to review by the referring court. In non-jury actions, as here, the court must accept the findings of fact filed by the master unless it finds them to be clearly erroneous. Federal Rule of Civil Procedure 53(e)(2). A finding is clearly erroneous only if the reviewing court is left with a definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525 (1948); *United States v. Welp*, 469 F.2d 688 (9th Cir. 1972).

The court is more than satisfied that the findings are not clearly erroneous; it is of the opinion that the findings are supported by substantial evidence. The court has extensively reviewed the transcripts of testimony and the documentary exhibits lodged with the court. Moreover, inherent in the findings is the magistrate's evaluation of the credibility of the witnesses; this court also had, at the initial stages of the proceedings, its own opportunity to observe wtinesses and evaluate credibility. [1084]

Finally, the court does hereby approve the conclusions of law filed by Magistrate McCue.

The court is mindful, given the able representation of all parties, of the substantial amount of testimony and documentary evidence introduced before the trier of fact. Clearly, Magistrate McCue's effort in analyzing the complex issues in this case, synthesizing the evidence adduced, and reaching the reasoned findings and conclusions submitted to this court was Herculean in concept and he has, in my judgment, discharged his responsibility in an exemplary fashion, both to this court and as contemplated by the mandate of the Magistrates Act.

The court will supplement this Memorandum Decision and Order with its ruling on the motion for attorneys' fees by the F.D.I.C. and the trustees of Westgate.

DATED: May 7, 1976.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:
Plainiffs
Defendants

[1085]

APPENDIX C.

Memorandum.

In the United States Court of Appeals for the Ninth Circuit.

California Little America Co., a corporation, et al., Plaintiffs, vs. Helen Smith, Defendant Counter-Claimant-Appellant, vs. Paul Andrew, as Receiver in Action 74-50-N, et al., Counter Defendant-Appellees. No. 76-2753.

Federal Deposit Insurance Corporation, as Receiver of United States National Bank, Plaintiff-Appellee, vs. Westgate Plaza, a California corporation, et al., Defendants, Helen Smith, Defendant-Appellant. No. 76-2754. On Appeal from the United States District Court for the Southern District of California

Filed: Feb. 9, 1979.

Before: MERRILL and HUG, Circuit Judges, and BOHANON,* District Judge

These actions arise out of the failure and receivership of the United States National Bank located in San Diego, California (the Bank), and the failure and bankruptcy of Westgate California Corporation (the Corporation). One of the Corporation's principal assets was the Westgate Plaza Hotel of San Diego (the Hotel), on which the Bank held a [-1-]

trust deed. Appellee Federal Deposit Insurance Corporation (FDIC) is the Bank's receiver. Appellee California Little America Company is the purchaser of

*Honorable Luther L. Bohanon, Senior United States District Judge of the Western District of Oklahoma, sitting by designation.

the Hotel from the trustees in bankruptcy of the Corporation.

In 1964 appellant, an interior decorator and dealer in antiques, met C. A. Smith, president of the Bank and of the Corporation. As a result of their meetings and discussions appellant was employed in 1967 to purchase furnishings for two planned hotels and other Corporation buildings. This she did until failure of the Bank and the Corporation in 1973-74. In 1968 she and Smith were married and the couple occupied a luxury suite in the Hotel after its completion in 1972.

Appeal No. 76-2753 concerns an action in unlawful detainer brought by appellees against appellant to compel her to vacate the Hotel suite and pay back rent due.

Appeal 76-2754 arose from an order issued in a suit brought by FDIC for foreclosure of its trust deed on the Hotel. The order directed appellant to appear and substantiate her claims to ownership of certain items of furnishings and art objects located in the Hotel.

The district court appointed a magistrate to hear evidence and prepare findings of fact and conclusions of law upon both matters. The court adopted the findings and conclusions of the magistrate and entered judgment upon them from which this appeal is taken.

The Unlawful Detainer Action

The magistrate found, and the district court adjudged, that rent of $2,500 a month for the Hotel suite was due for the period from October 15, 1973, to December 15, 1975: $7,500 to the Corporation, $12,500 to the

receiver, and $43,750 to the California Little America Company—a [-2-]
total of $63,750.

Appellant contended below and contends here that an oral agreement existed between her and the Corporation setting off the rent due from her against sums owing to her from the Corporation for furnishings and services provided by her. The explanation of this set-off agreement was that, pursuant to it, there would be from time to time an exchange of checks of equal amount, in effect reducing her debt for rent to zero. The magistrate found no record or evidence of such an arrangement or of any application by the Corporation of sums due to appellant upon her rent obligation. He rejected appellant's claim that such a set-off arrangement existed. We find no basis for disturbing his factual determination. Finding no credible evidence of a set-off for rent due, he concluded that any money claims that appellant had against the Corporation were in dispute and could not be decided in this action. He stated: "The 'set-off' of mutual, valid obligations between the Trustees of Westgate and Helen Smith is a matter for the bankruptcy court." We agree.

Action Respecting Furnishings and Art Objects

With respect to this action the magistrate stated in his findings of fact and conclusions of law:

> "The principal dispute among Helen Smith, the Federal Deposit Insurance Company (FDIC) and the Trustees for Westgate California Corporation (Trustees), involves antique furnishings acquired by Mr. and Mrs. Smith for use in the Westgate Plaza Hotel and other Westgate enterprises. The furnishings in dispute are presently located on

> premises that are or were formerly under the control of Westgate California Corporation and the United States [-3-]
> National Bank (USNB).
>
> * * * *
>
> The items in dispute are unique and generally of high value. These are the class of items that were acquired exclusively by Mr. and Mrs. Smith for use in the Westgate Plaza Hotel common areas and luxury suites on its 19th floor, as well as the Cuyamaca Club and Westgate Executive Hotel. They were acquired for the purpose of re-creating within the Westgate Plaza Hotel the elegance and charm of the eighteenth century world of French aristocracy that has long since ceased to exist."

The issue presented by the dispute was whether each of 430 different items was at the time of Hotel's sale to Little America Company owned by appellant or by the Corporation. The magistrate stated:

> "Because of the unusual nature of the task, most of the purchases by Mrs. Smith, and also by Mr. Smith, were made at auctions, auction houses, art galleries, and from individual collectors, including some from Mrs. Smith's own personal collection.
>
> All of these items required special handling and attention to minimize the risk of damage. As the purchasing program developed, a small group of persons was formed that specialized in handling, storing, and placing these objects in locations specified by Mrs. Smith. * * * All were Westgate employees and worked at various Westgate sites with unimpeded access among the

sites. Mrs. Smith was in fact the leader of this group, and each one responded to her direction or the direction of her [-4-]
secretary and bookkeeper, Hilda Edmunds, who was also carried on the Westgate California Corporation payroll.

* * * *

Since most, if not all, of the items involved in Mrs. Smith's claims are the type of items that are considered assets of a corporation, one would think that it would be a simple exercise in asset tracing and accounting to verify or deny the claims.

Unfortunately, however, this is not the case. The testimony of Westgate employees and former employees, as well as the books and records of Westgate, clearly reveal a total and complete disregard for the ordinary business requirements to properly identify, record and account for, by description and location, the antique items acquired from Mrs. Smith. There was no credible attempt to maintain a current inventory of antiques or objects-of-art for the benefit of the Westgate California Corporation or the Westgate Plaza Hotel. There was no attempt made by the Westgate employees charged with the 'receiving' function responsibility to permanently identify each item with an asset number or to permanently identify the item with a particular purchase order; nor was there a credible effort on the part of the Comptroller or the accounting office to enforce such a procedure or to maintain a fixed asset inventory for Westgate.

It is impossible for the court to determine with any certainty the purchasing, receiving, asset identification procedures followed by the Westgate-Kropp group in handling items supplied by Mrs. Smith, because there was simply no such formal procedure [-5-]
followed."

The magistrate attributed this lack of adequate records to appellant. He stated:

> "The court finds that the basic reason for the failure of the Westgate California Corporation to properly account for the assets that it was purchasing through Mrs. Smith was a fear of Mrs. Smith on the part of Westgate's responsible managers and controllers because of her relationship to C. A. Smith. * * * For these men, Mrs. Smith's identity had merged with that of her husband, C. A. Smith. She had become his alter ego; and they did not intend to invoke his or her displeasure, regardless of the accounting and financial chaos that such silence would engender.
>
> * * * She in fact supervised the 'front line' Westgate personnel handling the [disputed] items, authorized invoicing and sometimes the issuance of Westgate purchase orders from her own office. She was in fact, and this is clearly undisputed, the single source of all information on the [disputed] items purchased for Westgate.

Appellant has contended throughout trial and appeal that under her agreement with the Corporation she acted as an independent furnisher of the disputed items, taking title in her name (or her fictitious name, International Interior Designs—IID) and reselling to the Corporation. Thus, she contends, it was necessary, notwithstanding the difficulties encountered by the mag-

istrate, to determine whether title had passed to the Corporation as to each of the disputed items. The magistrate avoided this Herculean labor. He found that under her agreement with the Corporation she was to be a full-time employee of the Corporation [-6-] buying exclusively for it. He concluded that while she could claim ownership of disputed items acquired prior to the date of the agreement, all items acquired subsequent to it were acquired for the Corporation with title passing directly to it. The magistrate recognized that the relationship was not a conventional employee-employer relationship. However, he concluded that appellant was not an independent contractor; the apparent purchase and resale arrangement was pursuant to a facade of independence, created for the benefit of the Corporation in order to enable appellant to secure a dealer's price in making her purchases for the Corporation. The magistrate emphasized that appellant's employment was full time; that all her expenses and overhead and those of IID were met by the Corporation; that IID was staffed by Corporation employees; and that Corporation employees took direction from appellant as the Corporation executive in charge of furnishing the Hotel. He concluded:

> "It is the finding of this court that the 'Letter of Agreement' created the relationship of Principal and Agent between Westgate California Corporation and [appellant]. [Appellant] was clearly employed by Westgate to perform personal services for its benefit and its benefit alone, not as a conventional salaried employee, but rather as its agent who could speak for Westgate, act for Westgate, and commit Westgate to financial expenditures of its funds. As an agent, [appellant] was

> a fiduciary and subject to all of the duties and obligations that such a fiduciary relationship entails."

Further, he found that appellant's actions under the agreement were consistent with an agency relationship. He [-7-]
concluded:

> "Ths court therefore finds that Mrs. Smith was in fact and in law an agent of the Westgate California Corporation."

It is this conclusion that is most strenuously challenged on appeal. In our judgment, however, the record as cited by the magistrate amply supports his finding of an agency relationship.

Appellant attacks this finding and asserts that "the trial court disregarded the hard evidence on 340 items." (Some 30 items were specifically discussed.) The magistrade did not disregard "hard" evidence, however, for if one thing is made plain in his findings and conclusions, it is his view that appellant's evidence was simply not credible. He recites instance after instance in which testimonial or documentary evidence upon some particular item was devastatingly impeached. His final sentence on page 104 of the findings and conclusions was:

> "This court, after careful and thoughtful deliberation, finds that Helen Smith's evidence is in large part unworthy of belief."

The magistrate dealt specifically with items secured by appellant for the Corporation at an auction of antiques and art objects owned by Jean Owings. He concluded that title to all items purchased at that

auction passed to the Corporation. Several of them could not be found. As to these he ruled:

> "As to the twenty-three full items and seven partial items that are still missing and unaccounted for from the Jean Owings auction, that cost Westgate California Corporation $49,766.00, plus sales tax liability, it is patently clear to this court that [-8-]
>
> they have been misappropriated and converted to the use of persons other than the true owners. The court finds that only two persons were in a position of authority over the movement of these items, and these persons are Mr. and Mrs. C. A. Smith; and they are therefore jointly and severally liable to the Westgate California Corporation for the loss sustained by Westgate."

Judgment against appellant on these item was rendered by the district court in the sum of $49,766 plus sales tax liability.

Appellant contends that under the order by which she was summoned to appear, the issue presented was as to title to "personal property assets located on the premises of the Westgate Plaza Hotel, to which said Helen R. Smith * * * may claim title or right to possession." She was *not* ordered, it is asserted, to defend herself against any charge of conversion or any demand that she return furnishings not located on the Hotel premises.

It is clear, however, that much testimony and documentary evidence respecting the missing items was received without objection. (Appellant originally claimed these items as gifts from her husband, although she withdrew this claim during trial.) Moreover, it was

made clear to appellant that appellees were holding her accountable for the missing items. It is our judgment that the issues were expanded in this respect and that judgment dealt with a dispute properly before the court.

Appellant contends that the claim of conversion was time barred by the California statute of limitations. Under California law an action for conversion by an agent does not accrue until the principal acquires knowledge of [-9-]

the breach. That date here was clearly within the statutory period.

We find no merit in the remaining assignments of error.

Judgment affirmed. [-10-]

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

California Little America Co., a corporation, Federal Deposit Insurance Corporation, as Receiver of United States National Bank, Plaintiffs, v. Helen Smith, Defendant-Appellant. Nos. 76-2753, 76-2754.

Federal Deposit Insurance Corporation, as Receiver of United States National Bank, Plaintiff-Appellee, vs. Westgate Plaza, et al., Defendants, Helen Smith, Appellant.

Filed: Apr 10, 1979.

BEFORE: MERRILL, HUG, Circuit Judges, and BOHANON,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc, and Judges Merrill and Bohanon have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Hon. Luther Bohanon, United States District Judge for the District of Oklahoma, sitting by designation.

APPENDIX E.

Reporter's Transcript of Proceedings on Appeal, August 21, 1975, San Diego, California, Volume XXXIII.

EVIDENTIARY HEARING

United States District Court for the Southern District of California.

Before Hon. Harry R. McCue, U.S. Magistrate, Annex B-3.

Federal Deposit Insurance Corporation, as receiver of United States National Bank, Plaintiff, vs. Westgate Plaza, a California Corporation; United States Holding Company, a Corporation; and the United States of America, Defendants. Civil No. 74-50E.

Reported by Thomas V. Dooley, CSR No. 2357

By Mr. Bowles:

Q My question is, Mrs. Smith, do you have any other documents that you haven't been telling us about?

A Not that I know of.

Q So, Mrs. Smith, am I correct that as you sit here today the only documents that you know of from the auction that you've been able to find are a catalog, this memo that Mr. Engstrand has just shown us, the letter from Mr. Smith to Abel, and a memorandum of some sort relative to that $900 payment?

A I think that's all.

Q Where did the letter to Abel come from, Mrs. Smith?

A Which one?

Q The one that Mr. Smith wrote.

Mr. Engstrand: Plaintiff's 66.

The Court: Have you got that, Mrs. Smith?

The Witness: Yes, sir. It came out of one of my files that I took home to go through, and just in general, to look for items. I'm not sure—I believe it must have been out of the Abel file.

By Mr. Bowles:

Q Mrs. Smith, one of the files that you took home from your office?

A Yes, sir.

Q And, Mrs. Smith, that would have been in one of the files that you made available to us to review?

A I don't really know what you reviewed. I just made all my files available to you.

Q. Well, Mrs. Smith, how did you find the Abel file? [2040]

A How did I find it?

Q Uh huh.

A I just went down and pulled a lot of files, and took them home, and started going through them in the evening while I've been involved in this litigation.

Q So, Mrs. Smith, No. 66 just came out of one of your general files in the file cabinets?

A Yes, sir.

Q What about the memo that Mr. Engstrand just showed us dated July 7, 1970—where did that come from?

A I just don't remember. I can't recall.

Q How long have you had it?

A Well, I only discovered it within the past week, but I'm not sure of how long I've had it.

Q Well, where did you discover it?

A In files that I've been going through.

Q Are those files other than the files that you've maintained in your office?

A No, just some that I've been taking home and going through and reading myself. I had not looked at them for a very long time.

Q What were these files entitled, Mrs. Smith?

A Just various suppliers—vendors, I suppose you'd call them.

Q What about the $900 letter—where did that come from, Mrs. Smith?

A Well, I just don't remember, Mr. Bowles.

Q One of these same files? [2041]

A I don't recall.

Q When did you find it?

A Within the last week.

Q Within the last week?

A Uh huh.

Q You don't recall from where you found it?

A Well, it came out of my office.

Q Where did it come out of your office—from where?

A I don't—I just gathered up a lot of files, and took them home, and went through them.

Q Now, Mrs. Smith, you recall that previously I asked you about photographs of the Marvin Newman items?

A Yes.

Q Did you find any photographs of the Marvin Newman items?

A No.

Q Do you recall that?

A Excuse me—just the ones that you already have, the catalog. Not speaking of the catalog again.

The Court: On that subject, Mrs. Smith: were all the items that were the subject of that auction, were they photographed in that catalog?

The Witness: No, sir. Just select ones, the more important ones.

The Court: Just significant items were in—

The Witness: Well, I think that's a misstatement. They did select some small inconsequential items; but for the most part they were the more important items [2042]

that were photographed.

Mr. Engstrand: Do you want the Catalog?

Mr. Bowles: Why don't you let Mrs. Smith look at the catalog.

The Court: You gentlemen will forgive me for interfering, but it just seems to me that we have a catalog that has photographs of some items. Perhaps one of the solutions to the Marvin Newman Auction is to ask Mrs. Smith to review it, and perhaps indicate those items that she knows were at that auction in addition to the ones she's already identified. It's just a suggestion.

By Mr. Bowles:

Q Now, Mrs. Smith, you recall that we discussed at one point in your cross-examination photographs taken by the man that took the photographs for the catalog?

A Yes.

Q Do you recall that you or Mrs. Fenton had written, at Mr. Smith's request, to get some photographs?

A I'm not sure—excuse me for interrupting—I'm not sure who made the request. I recall seeing a letter

written by her to a photographer asking for photographs. I'm not sure whether they ever obtained any, or if they did, where they went.

Q Let me read your testimony, Mrs. Smith, to refresh your recollection. It's at page 142 of the Reporter's Transcript for July 22, 1975. The question was: "What about any that were taken of the furniture originally in its place at Mrs. Owings' home?" [2043]

Your answer was, "I never had any of those. Oh, wait a minute. I vaguely remember either I wrote, or Beverly Fenton wrote, at Mr. Smith's bequest, to try and obtain some for Mr. Smith of the items that he had purchased for the hotel. Whether or not they were ever received I don't remember. But I do remember getting the name of someone and writing regarding them, so I'm not sure. I don't recall ever having seen them."

Does that refresh your recollection?

A Yes. However, I've asked Mr. Smith, and he doesn't think that he asked me to get them. He thinks it was someone in the publicity department.

Q But what you were doing, Mrs. Smith, as you have indicated in that answer, was getting pictures of the items that were purchased for the hotel, for their publicity?

A I really—I can't say that positively. That's just a general sort of hazy recollection that I have.

Q Mrs. Smith, in order to have done that you had to have a list of the items that had been purchased, didn't you?

A No.

Mr. Engstrand: Your Honor, I don't know how long we're going to—I'm going to object unless counsel

makes an offer of proof. I don't know why we don't just get down to brass tacks. Counsel, I think, has been playing long enough as far as trying to test Mrs. Smith's recollection, and what files she got something out of dozens and dozens of files—unnecessary prolongation of getting to the issue of what are the items, and who bought them, and paid for them, and— [2044]

The Court: I can't help but agree, Mr. Engstand, you know, that if we have that information, that's what we should be getting down to.

Mr. Bowles: Your honor, we are getting there. However, the only issue in this case is not just identification of the items. Credibility is a major issue in this case, as the Court knows, and this is a major area of credibility.

The Court: Yes. But if there is hard evidence, I would like to see some of that.

Mr. Bowles: Well, we're getting to it.

The Court: I've got a catalog here, and apparently it's been in the hands of parties to the lawsuit. And looking at it, I recognize items of furniture, and photographs of—

Mr. Bowles: We're getting to it, your Honor.

The Court: Let's get that down. I'm under the impression there's a big mystery as to where this is. Obviously the mystery is only on the part of this Court.

Mr. Bowles: That's not true, your Honor. And if the Court will bear with us, there seems to remain a substantial mystery.

The Court: Let's narrow it down.

Mr. Bowles: We're getting there, your Honor. As for a couple of items, that's probably true.

The Court: Well, it only took two minutes. I suppose if I had time—let's get to it. [2045]

By Mr. Bowles:

Q Mrs. Smith, your last answer was that in order to obtain those photographs you didn't have to have a list; is that correct?

A That's right.

Q And is it your testimony that you didn't have a list of the items that had been purchased for the Hotel when you sought to obtain those photographs?

A Right. I didn't have.

Q Now, are you distinguishing between you and your office?

A Well, I can't account for what someone else knew or had, Mr. Bowles. I know I never had a list.

Q Well, Mrs. Smith, Mrs. Fenton and Mrs. Edmunds and people in your office didn't write letters and do things without your direction, did they?

A Yes. Lots of Beverly Fenton's letters were written at Mr. William's request, and other people in Westgate that I didn't know about.

The Court: And Mrs. Fenton—I think it was "Mrs." Fenton, or was it "Miss" Fenton?

The Witness: Mrs.

The Court: Mrs. Fenton—She was an employee of Westgate?

The Witness: Yes. Well, I think we have to define —she was an employee of Westgate?

The Witness: Yes. Well, I think we have to define—she was paid by them. And she was a liaison between

my office and their office, and they frequently had her write letters and do various things. In fact, [2046] most of her work, major portion of it was done for Westgate—record keeping, and what they wanted.

The Court: So she really was being directed by other people in addition to yourself; is that right, Mrs. Smith?

The Witness: Right. Right.

By Mr. Bowles:

Q Well, Mrs. Smith—and picking up on the court's questions—Mrs. Fenton didn't write letters over your signature for anyone but you, did she?

A She did. She did. She frequently wrote letters over my signature. I was sometimes amazed to see what she wrote.

Q Is this "BBB"?

The Clerk: Yes.

By Mr. Bowles:

Q And Mrs. Fenton worked in your office as your secretary, didn't she?

A In a sense, yes.

Q Mrs. Smith, while she is finishing that, I will let you look at my copy so we'll save some time.

Thank you. With respect to Exhibit BBB—I'll trade you now—

A Uh huh.

Q I will represent to the Court that the first letter and this last letter are copies that we obtained from Mrs. Smith's files. The middle letter is one that we were able to obtain from Mr. Fraker.

The Court: Well, let's be a little more specific. [2047]

The letter of June the 4th, 1970, which is the first sheet of BBB?

Mr. Bowles: Right. The letter of June 4th, 1970 was found as you see it here, your Honor, in Mrs. Smith's files, without the attached list. The letter of July 13th, 1970 was found in Mrs. Smith's files. The letter of June 22nd, 1970 we obtained from Mr. Fraker.

Mr. Engstrand: Your Honor, I think that if such a representation is to be made it maybe should be made under oath, and the witness be subject to cross-examination. I don't know what kind of games are going on here, but I am—

The Court: Well, I'm a little disturbed myself, Mr. Engstrand. I would think that all of these documents, in the spirit of getting this case resolved, could have come out long before this.

Mr. Bowles: Well, Your Honor, one of these—the middle one, June 22nd, 197—we only obtained last week. However, the Court can tell by looking at these documents that even after we spent five days going through her records we weren't able to find everything.

The Court: I can't tell that.

Mr. Bowles: Well you can tell it if you are willing to accept the fact that I found that as I told you. I found this one.

The Court: Well, if that's what you want to represent, then I think Mr. Engstrand has got the [2048] right to call you as a witness.

Mr. Bowles: Well, we didn't call Mr. Engstrand as a witness yesterday, and he spent an hour telling you about all the records he found, Your Honor. In fact, objections were made to your doing so, and the

court was courteous enough to him, and I think we are entitled to the same courtesy.

The Court: I was under the assumption that the discovery procedures in this case were reciprocal. And, you know, talking about all these documents—we have a financial hemorrhage going on here under the disguise of administration of justice, and I think it is about time we started being practical about it. And let's have an exchange of the evidence that exists in this case.

Mr. Bowles: Well, Your Honor, we're in the process of doing that. I think we're entitled to save from impeachment and cross-examination those documents.

The Court: Well, listen here. You fellows have been at this impeachment task now for some time. Okay. And, I don't know, it's just cumulative at this point. And I think we should get down, and instead of playing these word games in court with "When did you get the catalog," and all of this business—that's all been resolved, and you can stipulate to that—let's get to the hard core of the matter.

Mr. Bowles: Your Honor, Mr. Engstrand said in Chambers yesterday, "Gee, if anybody could come up with [2049]
this documentation, I'm not going to hold it against anybody." Here we spend 15 minutes with trying to get—we are trying to get this documentation into the court, and in an orderly fashion. And if he'd be quiet, we'll do it.

The Court: Well, the basis for his objection is that when putting in these documents you are also suggesting—if I understand, and I can understand the English language—that there was a concerted effort

to conceal and hide it because it wasn't there when you looked through the records.

Mr. Bowles: Well, if Mrs. Smith would bring in the second page of it, we'd be delighted to have it brought in.

The Court: Well, just get the documents in. Let's have no editorializing.

By Mr. Bowles:

Q Mrs. Smith, have you ever seen any of these letters before?

A I don't remember. I probably could have.

Q Mrs. Smith, the first letter, June 4th, 1970, sends to Mr. Fraker a list of items.

A Yes.

Mr. Engstrand: Your Honor, these documents seem to speak for themselves. And unless counsel has some offer of proof, I can't see anything about them that requires any further explanation.

Mr. Stechel: Certainly you can examine on a [2050]
document that 's been offered.'

The Court: Right. We'll continue the examination. We'll give you another ten minutes on this, Mr. Bowles.

Mr. Bowles: I don't need ten minutes on this, Your Honor, unless I'm going to get an objection on every question.

By Mr. Bowles:

Q Mrs. Smith, where is that list?

A What list?

Q The list referred to in this letter of June 4th, 1970.

A I have no idea.

Q Mrs. Smith, you have searched through your files and you can't find it; is that correct? You haven't found any such list?

A I have no lists on the Jean Owings Auction, except one that I would sit down and make up myself from the catalog or from my own personal knowledge of what was bought in the auction. And I could have done that for Beverly Fenton, I don't know, at the time that she wrote the letter. I just don't remember it.

Q And you never had in your possession or at your access a list of the invoices, or the invoices and what they showed?

A I do not recall ever having had, and I know of no reason why I would have had.

Q Now, Mrs. Smith, the second page of document BBB, sends a supplemental list requesting auction [2051]
items, does it not?

A That's what it would indicate.

Q And, Mrs. Smith, on that list you recognize items that are some items that are claimed by you, and some items that are not claimed by you, don't you?

A No, I'd have to look them up in the catalog.

Q Well, look at item No. 81, page 42, "Painting, Rural Landscape by Crestwick."

A I don't find that. Is that on your list?

Q Are you looking at the third page of that Exhibit, the list on the third page?

The Court: It's this list, Mrs. Smith.

Mr. Bowles: She has it, Your Honor.

A Oh, yes. Yes, sir. I still don't find Item 81. Is it on this list?

Q See under catalog, Item 81, page 46—or whatever that page number says.

A I'm looking at the page, yes.

Q "Painting, Rual Landscape, Crestwick."

A Yes, I'm sorry. I don't understand your question, now; what is it?

Q Is that the painting that is in your dining room?

The Court: Just so that you will—here's the picture of it.

The Witness: Yes, that's what I need to see. Yes, that is the painting.

By Mr. Bowles:

Q It's the painting that is handing in the dining room [2052]
of the suite that you do not claim?

A That's right.

Q And if you go down to 291, Item No. 291, for instance, you'll see, "French Rosewood Vitrines."

The Court: I'll get that.

Mr. Bowles: She's got the book in front of her also, Your Honor.

A Yes.

Q And those are vitrines that are where, Mrs. Smith?

A On the second floor of the Westgate Plaza Hotel.

Q Peacock Alley?

A Yes.

Q Not claimed by you?

A Right.

Q If you will look up on the list at No. 254, page 91, you see the infamous Satsuma Sevres porcelain urns and covers that you had made into lamps?

A That isn't correct.

Q That isn't correct?

A No. They were already made into lamps. I had lamp shades made for them.

Q Let me correct that, Mrs. Smith. Those are the same ones that you have in a small bedroom that we have talked about previously, aren't they?

A Well, I think that they are. Although they are very much like a pair that I have purchased from a woman by the name of Martha Roberts. And I've had some question in my mind of whether they are the same ones; but they appear to be from the [2053] photograph.

Q And they are the same ones that were previously on display on the second floor of the hotel that you then had moved up to 1901 to the small bedroom—Sevres lamps, No. 254?

A As I said, I have some reservations, but I think that that is probably correct.

Q And, Mrs. Smith, the third letter—

The Court: Now, just a minute, Mr. Bowles, my memory fails me—do you claim those as your personal property, Mrs. Smith?

The Witness: Yes. Mr. Smith bought them for me in the auction. I think the question that I had was that they were actually lamps when they were purchased in the auction. I had shades made for them.

Mr. Stechel: The hotel paid for shades for them?

The Witness: That 's right.

By Mr. Bowles:

Q Mrs. Smith, the third letter is one dated July 13th, 1970. The next letter—and you will see, Mrs. Smith, that three items are listed on that letter—three item numbers, and page numbers?

A Yes.

Q And if you look down the prior page, the list on the prior page, you will see that 305 is not on that price list. Right there.

A Yes.

Q So there must have been an additional list someplace, wasn't there, Mrs. Smith? [2054]

A. I don't know, Mr. Bowles.

Q Your Honor, we would move 'BBB' into evidence.

Mr. Stechel: Trustees join in that.

The Court: Okay.

Now, just a minute, Mr. Bowles, let me just follow that up. That's in the catalog, right?

Let me show you pictures of this, Mrs. Smith, and ask you if you identify this. I'm showing you now the catalog.

The Witness: Yes, that's the Henry Dawkins desk that's signed and dated. I think there were 12 of these made.

The Court: All right. Do you know where that is now?

The Witness: Yes, it's in the lobby of the Westgate Plaza; the first floor lobby.

The Court: You don't claim that is yours?

The Witness: Oh, no.

The Court: Let's just nail this other one. Let's get the number—page 37.

Mr. Engstand: Why can't we talk about the ones she claims instead of the ones she doesn't claim?

The Court: Well, that's what I am trying to do, Mr. Engstrand. Have you analyzed this in terms of whether or not she claims or not?

Mr. Bowles: Your Honor, if the court will bear with us, we have this orgnaized in the fashion that they are put before the court, all of them that are [2055]
claimed, and not claimed, unidentified, and all the other items, things that the court is concerned about.

Mr. Engstrand: In view of the time problems involved, I object to putting before the court the items that are not claimed until there's some offer of proof as to relevance.

Mr. Bowles: The relevance is the hotel paid for them and they're not around.

Mrs. Smith, to go on to the cross-examination—

The Court: You were saying—

Mr. Engstrand: We will just represent—I'll accept our stipulation. I'll stipulate to whatever you say they've bought and is not around. Then if you want to try to infer that Mrs. Smith has stolen them, then we'll take it up at an appropriate time.

The Court: I go along with that. Let's talk about the items that are claimed and are lost.

Mr. Bowles: Well, Your Honor, we are certainly entitled to have the benefit of Mrs. Smith's knowledge of whereabouts of any of these items that we can identify.

Mr. Engstrand: Ask her.

Mr. Bowles: I propose to. But let me get to it. I am trying to do it in an orderly fashion.

The Court: Well, three out of four so far, we know where they are, and they are unclaimed.

Mr. Bowles: If the court would bear with us, we'll get right to those issues in due course; we've [2056]
got all the documentation prepared.

The Court: It just seems like the ancient Chinese torture of a cut at a time. And I would much rather be overwhelmed with evidence, and smothered.

Mr. Bowles: Well, I assure the court, by the time the day is over he'll be overwhelmed and smothered.

The Court: Good. I've been waiting for that.

By Mr. Bowles:

Q All right, Mrs. Smith. You told us last time you were here, I believe, that some of these auction items were purchased by Mr. Smith for himself. Do you recall?

A Yes.

Q And that he purchased some of them for Carole Shannon?

A That's what he told me.

Q Did he purchase them for anyone else that he told you about?

A He may have. I don't remember.

Mr. Stechel: Mark the last three answers in the record.

The Court: They'll be marked.

Mr. Stechel: Thank you.

By Mr. Bowles:

Q Mrs. Smith, did Mr. Smith take the items that he purchased for himself?

A Well, some of them he didn't take anywhere. They stayed in the storeroom that I had in the basement of the [2057]
hotel. Some of them he may have taken, I don't know. I really was only concerned with what he bought for me, and what he had bought at my suggestion for use in the hotel, and I paid no attention to the others.

Q What did he buy for Carole Shannon, Mrs. Smith?

A Well, I only know of two things that he mentioned to me that he bought for her. He may have bought others.

Q What two do you know of, Mrs. Smith?

A One of them was a Chippendale secretaire. And the other one, he's told me since the auction that he bought it for her. I really didn't recognize it because I had not seen it before. And it's a large breakfront that's Chippendale.

Q Those are both in the sub-basement, aren't they?

A Yes. Now, he may have bought other things for her, I really don't know. As I've told you before, I attended the auction Sunday and Monday, and, I believe, Tuesday I was ill and didn't go. And I don't know what was purchased on the Tuesday. I believe this one large breadfront was purchased that night.

Q Mrs. Smith, there were also some items of clothing or something in the auction, weren't there—furs, and—

A Goodness, I don't remember that. There might have been.

Q Mrs. Smith, how did the items that were purchased at the auction get to San Diego?

A I don't know how the items that were purchased for the hotel or for anyone else got to San Diego. I was told that Jack Donathan and Jack Hovland brought the items that were [2058]
purchased for me down in their truck.

Q Who told you that?

A Jack Donathan.

Q Who sent them up there to get the items for you?

A Mr. Smith went up with them—or so they told me.

Q Mrs. Smith, while she's marking that one, I will show you my copy of this six-page document. My copy has six "NC's" on it, but that's the only thing I've added to it. Those are innocuous enough, I think.

The Court: Six pieces of paper will be marked 'CCC.'

By Mr. Bowles:

Q Let me switch with you. Mrs. Smith, have you ever seen those documents before?

A This one?

Q Yes.

A Not that I recall.

Q This six-page—

A I don't recall ever having seen this before.

Q Mrs. Smith, looking at the first two pages on this list, going to the back page for ease and simplicity, items on that list are not items that you claim, are they? Excuse me, let me withdraw that. There are items on that list that are not the ones that you claim were yours?

A I'm sorry, I don't understand the question.

Q Let me restate it. Looking at the first two pages of this list, the first page bears Jake Hovland and Jack Donathan's names on it. The second page is page No. 2, and if [2059]
you just look, for instance, at the second page, you see items on there that you are not claiming, don't you?

A Well, I'd have to check these against the catalog.

Q Well, the third item down, to simplify—that is the same Creswick painting, No. 81, isn't it?

A That's right.

Q That's not claimed.

The Court: So your position is that Mrs. Smith is not claiming any of those items on page 1 and 2?

Mr. Bowles: No, your Honor, I don't think that's a correct statement. I think if she looked at the list carefully and compared them with the numbers, we would find that there is some numbers on that that she does claim.

Mr. Engstrand: Is there somebody that can identify this list for us?

Mr. Bowles: Not that I'm aware of. I haven't checked with Mr. Hovland or Mr. Donathan. If you are going to bring either one of them in, we might use it with them.

We would move this into evidence, or leave it for identification, whatever the Court's pleasure at this time.

The Court: Let's mark it for identification, and get Donathan in here, if we have to get that far.

Mr. Bowles: We have him under subpoena.

The Court: You have him under subpoena. Maybe you can make an offer of proof of what he testified to, [2060]
and get it moving that way.

Mr. Bowles: I have never talked to him about this matter, your Honor. I don't know what he might say about it.

Mr. Engstrand: No, I haven't seen this before.

The Court: That name keeps coming up all the time. Every witness has mentioned it.

Mr. Engstrand: Did you say, have I talked to him? I have talked to him.

The Court: No. I said that about this. I say his name keeps coming up. It seems if we have to get to that point, we may call him in here. He may have some light to shed on this case.

It will be marked 'DDD.'

By Mr. Bowles:

Q Mrs. Smith, I have shown you a document that has been marked as 'DDD', consisting of seven pages, invoices bearing the numbers 7294, 7265, 7329, 7297, 7210, 7238, and 7335. Even seen those before?

A I don't recall ever having seen these before.

Mr. Engstrand: Could I ask counsel if the originals of these could be made available? Are they colored?

Mr. Bowles: I don't know the answer to that.

The Court: The answer to "are they colored?"

Mr. Bowles: I don't know the answer to "are they colored?" The document which these came from is locked up in a safe in the Plaza Hotel, and we'll have [2061]
to get them out of the safe.

The Court: Well, let's not wait.

Mr. Bowles: Well, I doubt that can be accomplished.

The Court: Is there a problem with the safe?

Mr. Bowles: The access to it. But I think we can resolve it today.

The Court: Who controls access to the safe?

Mr. Bowles: Pardon me? I don't know at this point.

The Court: Where is the safe?

Mr. Bowles: I believe it is up at the Plaza Hotel.

The Court: We have the city and the state—where in the Plaza Hotel?

Mr. Bowles: I don't know the answer to that.

The Court: Well, where did you get the Xerox copies from?

Mr. Bowles: From the copy before it went into the safe. I don't anticipate any trouble getting the original, I just haven't been able to get hold of Mr. Holdings last night to get hold of it. Mr. Holdings is in charge of the safe.

The Court: Well, tell Mr. Holdings we would appreciate it if he would open up the safe and give us the original.

Mr. Bowles: No problem, your Honor, as I say.

Let me substitute a copy of 66, a better copy of that, and give you this one to look at. [2062]

The Court: 66—do you mean 'DDD'?

Mr. Bowles: No. You have plaintiff's counsel marked 66, and the copy that they had I don't think is particularly legible. I think I have a little bit better copy.

Mr. Engstrand: You call this 66?

Mr. Bowles: It's the same thing.

Mr. Engstrand: "Dash 2" or something.

The Court: Let's call this 66-S.

Mr. Engstrand: 66-S?

The Court: "S" is for surprise.

By Mr. Bowles:

Q Now, Mrs. Smith, if you look at the back of this Exhibit 66, which you found in your files, you will see invoice numbers listed. I believe if you compare the invoices listed you will see that they are the same as the ones on 'DDD.'

Mr. Engstrand: I'll stipulate.

Mr. Bowles: Fine.

The Court: All right.

By Mr. Bowles:

Q Mrs. Smith, the letter that is marked 66 indicates that Mr. Smith is reporting to Mr. Abell that you have reported the following discrepancies which should be adjusted. Do you find that?

A Yes, sir.

Q Did you in fact advise Mr. Smith that, for instance, item 48 had been overcharged?

A He knew that the night that we bid on the consoles. [2063]

Q Mrs. Smith, my question is: Did you in fact advise Mr. Smith that item 48 had been overcharged?

A No, I didn't have to, because we discussed it with the auction firm the night that we were bidding on them. They escalated our bid.

Q Is your answer that you did not advise Mr. Smith of that?

A I don't recall mentioning it to him again. I might have.

Q Mrs. Smith, item No. 69: Did you advise Mr. Smith that the bid price was 500, whereas they were charging you 525?

A No, I don't recall that.

Q Did you advise him that item 27 should have been $375 instead of $450?

A I might have, Mr. Bowles. I don't have any recollection of these individual items, the small items, and any discussions concerning them. I could have.

Q Now, Mrs. Smith, how could you have done that if you didn't have the invoices?

A Well, I have some recall, Mr. Bowles. I would go down and look at the items, and the number on them, and know what we bid on them. And if he told me that his bill showed something different, and we would discuss it, I would certainly know that I had a recollection that something was $50 more or less than he would be telling me that he was paying for it.

Q So, Mrs. Smith, do I understand that you were able to obtain the charges that Mr. Newman or Mr. Abell were making for these particular items without ever having seen the [2064]
invoices?

A No, that's not what I'm saying. Apparently I'm not making myself clear, Mr. Bowles. Let me say it again. Mr. Smith had invoices for these items. And if he said to me, "Do you remember how much we bid on two urns—I thought it was 1,300—what did we bid? They've charged us 2,600." I would tell him what my recollection would be. And, hence, the letter.

Q So, Mrs. Smith, this letter of 66 represents your verbal communications to Mr. Smith without ever the benefit to you of seeing the invoice?

A I can't say that. I don't recall ever seeing the invoices. I recall discussing the discrepancies in the items.

One thing in particular that distressed me when I had looked at the consoles, and going home they were in perfect condition. And when they took them out of the wall they damaged them. And I saw them down in the basement when they were delivered, and he had given them to me in perfect condition, I felt, when we bought them.

And I said I think there should be a credit on that. And I think that then led to other discussions with him, probably on the telephone, Mr. Bowles—most of our communication in the daytime was back and forth on the phone. It could have been in person. I just don't remember it. I wish I could.

If I had ever seen an invoice I would have no reason in the world to tell you that I hadn't seen it. I just never recall ever seeing one. [2065]

Q Your Honor, I have presented the Court with a one-page document dated November 11th, 1969. It has been marked "EEE.'

I asked Mrs. Smith to read that.

A Yes. This is obviously not my signature. And I don't know who wrote it, but I certainly did not.

Q Who was "A", Mrs. Smith?

A "A"?

Q Yes. Who signed your name and wrote letters for you and indicated an "A" beside to show who did it?

A I haven't any idea who wrote this. I certainly didn't.

Q And I take it, Mrs. Smith, you didn't dictate this letter, or tell whoever it was that wrote it to write it?

A Well, I can't say that I had anything to do with it. I don't recall having ever written such a letter.

Q Mrs. Smith—

A And that is not my signature.

Q It sets out what you have just told us was the damaged ormolus and consoles, doesn't it?

A That's correct. But I passed this information on to Mr. Smith, and expected him to deal with it. I don't know where this memo came from.

Q And, Mrs. Smith, it also indicates down there that whoever is dictating this letter has had the benefit of looking at the invoices, doesn't it?

A They apparently did have.

Q And have found some items on there that apparently [2066]
were missing, totaling $1,300, and some other items on there that apparently had not been purchased?

A I have no recollection of this letter, Mr. Bowles.

Mr. Stechel: Please mark the last answer, Your Honor. All right?

The Court: All right.

By Mr. Bowles:

Q Let's get back to who the "A" represents. You don't have any knowledge of who the "A" represents?

A No.

Q There is someone sending memos to your husband over your signature, and you haven't got the slightest idea who it was?

A No, I don't.

Q Setting forth information that you have just related to us about the damage to the ormolus and the mirrors on the consoles, attributing to you the determination that it will cost $1,000 to fix these things?

Mr. Engstand: If it will help the proceedings, I will be willing to stipulate she signed it, even though she didn't—if that will help.

The Court: There's no question, Mrs. Smith, the information contained in this memo, you are probably the source of—right?

The Witness: Yes, yes. I gave it to Mr. Smith, probably on the day. This memo was probably sent by somebody in my office to him.

The Court: This is the written memorial of the [2067]
information you passed to Mr. Smith?

The Witness: Yes. But I have no recollection.

The Court: You didn't sign it.

The Witness: No.

The Court: You don't know who "A" is?

The Witness: I don't.

By Mr. Bowles:

Q Mrs. Smith, let's go back to 66, and let's look at page 2 of 66. See there, that in the second sentence, Mr. Smith is telling Mr. Abell that Mrs. Smith bid on these items?

A Yes.

Q Am I correct that that is a misstatement—that you didn't bid on these items?

A No. I bid on some of the items.

Q But you didn't buy the items?

A No.

Q Mr. Smith bought them?

A No—I bid on them for him in the early stage of the auction. He was a little bit shy about bidding, and he was afraid he would bid too fast, and overbid, and that he would escalate his own bidding. And he had me do it for a while, and then he started doing his own bidding at some point in time. And at one point we found we were both bidding at the same time on the same item.

Q Mrs. Smith, certainly, when you were bidding on the items for Mr. Smith, you knew that you were buying for the hotel?

A Would you ask that again? I knew what I was buying for the hotel? [2068]

Q When you were doing the bidding you knew if it was being bought for the hotel, didn't you?

A Oh. Yes.

Q And this was during the first couple of days that you were doing the bidding for Mr. Smith?

A No, no. The first couple of hours.

Q And, Mrs. Smith, what items did you bid on for Mr. Smith?

A I wouldn't remember that.

The Court: Mrs. Smith, how are you doing? Would you like a little recess?

The Witness: If the court doesn't mind, I think I'd like—

The Court: We'll take a little recess.

The Witness: Go take a pill.

The Court: All right, fine. And, Mrs. Smith, I want you to understand that any time you feel that you need a little break, or would like to get up just to walk around, just inform the court. I have a tendency to lose track of time, so don't feel reluctant about that at all.

The Witness: Thank you, Your Honor.

The Court: So, we will take five minutes.

(Recess.)

The Court: All right, now we are back in session. All parties are present. All right now, Mrs. Smith?

The Witness: Thank you. [2069]

The Court: We will continue a little longer.

By Mr. Bowles:

Q Mrs. Smith, do you recall when you went to the auction, Mr. Smith took a check for $100,000 as a pre-deposit?

A No, sir.

Q Do you see on invoice 7335, the last one of the bunch, an indication how they deposit by check of $100,000? Find that?

A Yes, where it has 50,000 at the top, and then marked through, and then $100,000?

Q That's what it looks like, uh huh.

A Uh huh.

Q And, Mrs. Smith, do you find on Exhibit 66-S an indication that Mr. Smith transmitted to Abell an additional $79,493.88 by check?

A Where am I now, Mr. Bowles?

Q Exhibit 66, the letter Mr. Smith wrote.

The Court: This one, Mrs. Smith.

The Witness: I don't have a number on it.

By Mr. Bowles:

Q Why don't you write "66-S" on that.

A Now, what was the question?

Q Find on that where Mr. Smith sent a check for $79,493.88 to Abell?

A That's what it says.

Q And, Mrs. Smith, have you had an opportunity during the recess to look through the invoices?

A No. [2070]

Q All right. Would you take a few minutes and look through the invoices, please.

Mr. Engstrand: Do you have a total?

Mr. Bowles: The totals I have run are very nearly the 180 figure—the one hundred, plus 79,483, less the deductions. So I believe they are a little over 180. I ran them three different times, and I've run the machine—I'll represent to the court, every time I've done it it's been 170, $180,000, within three or $4,000.

Mr. Engstrand: Okay.

The Witness: Yes.

By Mr. Bowles:

Q All right. Mrs. Smith, do you recall any items purchased at the auction that are not shown on that invoice, those invoices?

A Heavens. I wouldn't know.

Mr. Engstrand: Your Honor, I think that would take a little research. I think it's a proper question, of course, but—

Mr. Bowles: No quarrel with her researching. I just asked her if she had any.

Mr. Engstrand: Yes, sure.

The Witness: And I think she gave the answer.

Mr. Engstrand: She can look at it over the noon recess.

The Court: It would be helpful if we mark this catalog. [2071]

Mr. Bowles: That's what I propose to do.

The Court: We don't have copies of it for everybody, but we ought to mark it.

Mr. Bowles: The list that I just handed to you is 'FFF.'

Mr. Engstrand: And the catalog?

The Court: The catalog will be 'GGG.'

The Court: So that the reporter is straight, now, this sheaf of documents entitled "Jean Owings Auction" is marked defendants' FFF. And the catalog concerning the French furniture and art, paintings, silver, and crystal comprising the complete furnishings of the residence of Mrs. Jean Owings, that catalog is marked defendants' GGG.

By Mr. Bowles:

Q Mrs. Smith, I show you the document that has been marked 'FFF,' the same one that you have been looking at a copy. Have you ever seen that before?

A I may have. I don't recall it.

Q Isn't that the list that you had prepared after you came back from the auction of the items that had been purchased at the auction?

A I don't recall that, Mr. Bowles.

Q Mrs. Smith, didn't you have a list of the items that you had purchased at the auction prepared when you returned from the auction?

A I don't recall doing that.

Q You recognize the type on this, Mrs. Smith?

[2072]

A The what?

Q The type on this list, on these papers here, the typewritten print?

A No, I wouldn't recognize it. Are you saying it is one of my typewriters, or something?

Q Yes, Mrs. Smith.

A Could be. I don't know.

Q Mrs. Smith, you will note, if you compare these two documents—that is, 'FFF' with the invoices that are 'DDD,' and look right at the first page, for instance, of both the invoices and this list at item 48, you see on this list under "French Rosewood Vitrine" there is a price listed of $9,250, and on the invoices a price of $9,500. And you will see also, by looking at 'EEE,' that that's one of the items that was called to Mr. Smith's attention as being a mis-price—over-charge, I guess, is a better term.

You see that, Mrs. Smith?

A What was your question, Mr. Bowles?

Q If you look at 'FFF,' on the first page you find item No. 48 listed at $9,250. Do you find that?

A Yes.

Q And you look at the invoices, which are 'DDD,' you will find item 48 about the middle of the page—$9,500. You find that?

A Yes.

Q And if you look at 'EEE' you will see that's one of the items that this letter bearing your name pointed out—this memo bearing your name pointed out to Mr. Smith? [2073]

A Yes.

Q Your Honor, to short cut this: I believe that a similar comparison of each of the items on 'EEE' show the same results.

The Court: You will stipulate to that?

Mr. Engstrand: Yes.

The Court: All right. So stipulated.

By Mr. Bowles:

Q Mrs. Smith, after having looked at 'FFF' for a period of time, have you had any additional thoughts about your involvement in the preparation of that exhibit?

A I don't recall preparing the exhibit. And I don't recall the memorandum that appears to be with the same typewriter. I don't recall either one of them, Mr. Bowles.

Q Now, you are referring, Mrs. Smith, to 'EEE' as appearing to you to be from the same typewriter?

A Looks like it might be. I'm not expertise in these matters.

Q Now, Mrs. Smith, to where were these auction items shipped?

A Can't remember whether they went to the bank warehouse, or whether they went to the hotel, or whether they went part to the bank and part to the hotel.

Q In any event, Mr. Smith, all of the auction items—the ones that you claim or otherwise—came down to San Diego?

A Yes.

Q To either the bank warehouse, or the hotel, the Plaza Hotel? [2074]

A As far as I can recall. I wouldn't want to state that without reservation because I don't really recall where they came to initially.

Q In any event, Mrs. Smith, they were all to be brought down to San Diego, correct?

A Yes.

Q And they would ultimately, like this other furniture that we have been talking about, have come under the control of Mr. Kropp and Mr. Donathan?

A No, I don't particularly think that they would have. If they went to the bank warehouse—which because of Mr. Hovland's involvement it might happen that it went there—it would be under Jake Hovland's control. It would have nothing to do with Mr. Kropp or Mr. Donathan.

Q However, if it went into the hotel it would have been under Mr. Kropp or Mr. Donathan, wouldn't it?

A No. It would have been under the control of Ted Drak and two other men who were in Receiving at the hotel.

Q Mrs. Smith, didn't Mr. Donathan have control of the keys in the storage areas in the sub-basement in the Plaza Hotel when the receiving was going on?

A Not that I know of. I thought Mr. Drak and the people that were receiving were the ones that had keys at that time.

Q We're talking about the end of '69, aren't we?

A Yes.

Q Is it your testimony that Mr. Drak was up at the hotel in receiving in December of '69? [2075]

A I think he was there before that. And I'm not really sure that he was there for a very long time. And before him there were two other men there in receiving in the hotel.

Q In any event, Mrs. Smith, to sum all this up, the intent as you understood it was that all of these items purchased at the Marvin Newman auction were going to be brought into San Diego?

A Yes, they were all brought to San Diego.

Q And they were brought either to the G Street Warehouse or to the Plaza Hotel?

A Well, just a moment. They could have been, part of them go to G Street and part of them to the hotel, or they could have all gone either place.

Q Those are the only two places that they would have gone, to your knowledge?

A As far as I know.

Q Your Honor, what we have attempted to do is identify many of the items auctioned from the book and other fashions, and we have been able to identify them, and have prepared for the court a book titled "Auction Items" which we feel have been located.

The Court: This binder entitled "Auction Items—Located" will be marked—

The Clerk: HHH.

The Court: HHH.

By Mr. Bowles:

Q Now, Your Honor, in order to save time and added difficulties, we have gone through the claim lists and have [2076]
identified items that we think we have located on the claim list, and have totaled up the amount of dollars involved in that regard. And I would read off to the court at this time, if the court wants to make a list, the item number and the total that we have obtained for the items that are claimed, the total purchase price for the items claimed.

If the court would prefer to wait, we will try to get a list typed up over the lunch hour, which may be a simple way to do it.

The Court: I would either do it that way, or a Xerox of that.

Mr. Engstrand: It would be helpful for me if you had it. Would it take long to read them off, and I might be able to make use of them over the noon hour?

Mr. Bowles: No, it won't take long. The total of the items which are claimed by Mrs. Smith as gifts from Mr. Smith which we have been able to locate is $35,925, based on the invoice prices on the invoices in 'DDD.'

Mr. Engstrand: And the items are?

Mr. Bowles: Items are numbers 13, 20, 29, 71, 73, 74, 80—

Mr. Engstrand: Pardon?

Mr. Bowles: 98, 148, 254, 281, 288, 306, 312, 425, and 444.

With respect to No. 425, Your Honor, that I have included on the list, that is a large Meissen mirror stored in the garage of the Plaza Hotel which I believe [2077]

Mrs. Smith claims, but claims it as belonging to Mr. Smith—is that correct?

The Witness: No, I'm not claiming it. It's his mirror. I'm not claiming it.

Mr. Bowles: Well, it has been on your list previously, indicated as belonging to Mr. Smith.

The Witness: No, I don't think it's been on my list, Mr. Bowles.

The Court: But, nonetheless, you don't claim it, Mrs. Smith?

The Witness: No.

Mr. Bowles: So, to the extent that 425 is not claimed, the total should be reduced by $6,500.

The Witness: I'm not sure of those other items.

Mr. Bowles: We'll get to those, Mrs. Smith.

The Witness: All right.

Mr. Engstrand: So then, that would be $29,425.

Mr. Bowles: Something like that. Mr. Ardoin advises me also, counsel, so that we can clarify—Items 73, 74, and 80 which I read off to you are not included in that figure, the 35,000 figure that I gave you.

Mr. Engstrand: Is there a reason?

Mr. Bowles: Yes. They are Meissen and porcelain figurines that we believe to be claimed out of the vitrines, but because the pictures are not adequate we can't specifically identify the individual one with a price to it. [2078]

The Court: That's 73, 74, and 80?

Mr. Bowles: Yes, sir.

By Mr. Bowles:

Q Mrs. Smith, let me give you a copy of this book, and we'll move on into—

A I think somebody took my pencil.

Q Would you like to borrow one?

Mr. Engstrand: Your Honor, I notice that it's four minutes of 12:00, upon the wall—I guess it's only ten of 12:00 on my watch. And—

The Court: You know, that's the only thing that's speeded up in this whole proceeding, is that clock.

Mr. Bowles: And I just can't catch up with it.

The Court: When we started it was five minutes slow, but since I started lecturing counsel, the only thing that's speeded up was the clock You know, if I believed in logical conclusions, I'd have to say that the clock is the only one that's listening.

Your request is granted. We'll take a recess until whatever time you desire, Mr. Engstrand.

Mr. Engstrand: 1:30?

The Court: Is that enough time, Mrs. Smith?

The Clerk: We do have a 1:00 P.M. matter on the calendar.

The Court: So we'll be in recess until 1:30.

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LUNCHEON RECESS

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[2079]

THURSDAY AFTERNOON SESSION
AUGUST 21, 1975
1:45 P.M.

The Court: Good afternoon, gentlemen, and Mrs. Smith. We are now back in session, and I apologize for being a little tardy.

Now, let's move right along. Mrs. Smith was on the witness stand. Let's proceed.

Mr. Bowles: Your Honor, at the lunch hour I had to print up a summary of the claimed and believed to be located items. The Court would add the total, the total there is $35,925, I didn't total it at the bottom.

The Court: Shall we make this a part of an Exhibit, or something?

Mr. Bowles: Put it right in front of the book we were just talking about, which is 'HHH.' Now, that is subject to the reduction for that 425.

The Court: All right.

Mr. Engstrand: Your Honor, I had asked Jeannie if she would xerox a sheet of paper for me.

The Clerk: It's being done.

Mr. Engstrand: If I could interrupt a moment—as soon as I get that sheet of paper I could make a statement that it would be more easily understood if I had my sheet of paper.

The Court: All right. Do you want to stand in recess until we get the paper? [2080]

Mr. Bowles: Sure.

Mr. Engstrand: Just a minute or two if we could.

(Recess.)

Mr. Engstrand: This is just in my handwriting. I don't think it needs to become an Exhibit—but, of course, if it does, it can be marked. But what I have done is that, item 1, my item 1 is No. 13 of Defendants' HHH, and it is claimed by Mrs. Smith, and is located in the sub-basement. And the invoice amount—I'm not sure now whether I have taken these from 'FFF' or 'DDD.'

Mr. Bowles: I have taken them from 'FFF' You've taken them from the invoices. That's 'DDD.'

Mr. Engstrand: Anyway—yes, that's right.

The Court: All right. That's the invoices?

Mr. Engstrand: Yes. And then the next column I have put down the exhibit number in which the claim is that Mrs. Smith makes. So that of the items contained in 'HHH,' there are nine of them which she has actually made claim for.

Mr. Bowles: That's not necessarily a correct statement.

Mr. Engstrand: Well, that's as I understand it to be.

The Court: Based on your analysis of this.

Mr. Engstrand: What's in evidence, right. And although Mrs. Smith and I didn't go back through everything, I did this in consultation with Mrs. Smith [2081] at noon, and this is her best recollection at the moment.

Now, what I am prepared to do is to withdraw her claim on all items subject to Westgate making a good faith representation that they have no evidence that Mr. Smith either paid or was charged on the books of Westgate or any of its subsidiaries for any of these items.

The Court: So as I understand it, you are willing to withdraw the claims that are manifested on this list?

Mr. Engstrand: Yes.

The Court: Subject to the adverse party's representation that Mr. Smith was not charged for nor did he pay for any of those items?

Mr. Engstrand: That's correct. And if they want to, you know, they don't have to answer that right now. My offer is good until—

The Court: Till they've had a chance to review?

Mr. Engstrand: Right. And I thought with that we might save some time.

Mr. Stechel: Your Honor, since the question is apparently addressed to Westgate, since we are the party who paid for these items and others—and others—and these items here are being claimed as Mrs. Smith's property alone, I would like to respond. Surely, we have no evidence that Mr. Smith paid for any of these items. In fact, we have no evidence that he paid a nickel on $180,000, among a lot of other things. So that's clear. [2082]

As to the plaintiff's motion to amend its quote "complaint" in this case—we don't have a complaint—but amend a list that has served as petition here for reclamation—that, of course, is up to the plaintiff. However, I don't believe, and I will not stipulate that because Mr. Engstrand chooses to write a list of nine items and he says that the matter, and she'll withdraw her claim, that this should be dropped and forgotten about. Because we have here $27,000 of lies—admitted lies—$27,000 of lies—items that are her property she says she lent to us. And it's very clear no one can

dispute. And these are items that Westgate paid for on Mr. Smith's say so.

So in short, they want to withdraw these claims, obviously we cannot stop that. And it reduces the number in controversy. However, and surely, we did not get reimbursed for this.

But, as to ending the matter of this auction, we will not stipulate that this is to remove the cross-examination on this matter and we should forget about the whole incident, no.

The Court: I don't think that was the thrust of Mr. Engstrand's suggestion, Mr. Stechel. I think his suggestion was that—and it was not an admission, as I understand it, that there was any intentional misrepresentation of fact—it was that at this point in time, clarification offered by Mr. Bowles, his exhibits of the status of some of the items that were [2083]
purchased at the Jean Owings auction—which, as I understand the testimony to reflect that Mrs. Smith was under the impression that many of them were gifts to her—and they are willing to relinquish their claim now on these items; is that right?

Mr. Engstrand: Yes. And I don't think the record needs clarification. But if Mr. Stechel—who is so quick to challenge people to lie—I challenge him to show in the record anyplace that Mrs. Smith's testimony where she has claimed these items to be hers on any other basis but that they were a gift from Mr. Smith.

The Court: Again, Gentlemen, you know, I had to give a little lecture to some lawyers here earlier, to the extent that in this courtroom there are any challenges, I'll do the challenging.

So, with that representation then on the part of the trustees, I think this removes—I will allow the exhibits that have been previously introduced to be altered according to this list submitted by Mr. Engstrand, and I'll amend it where appropriate.

Mr. Bowles: Your Honor, I thought that it might be helpful, to the extent that we can quickly do it, to run through these items and indicate the pictures that pertain to these items so that there is no misunderstanding as to what they are. If the Court feels that's necessary, we can do it very rapidly.

The Court: And when you say "these items," Mr. Bowles, do you refer— [2084]

Mr. Bowles: Talking about the ones to which claim is now being withdrawn.

The Court: I think I can figure those out.

Mr. Bowles: Okay.

The Court: I think I can go through those myself.

Mr. Bowles: The Court will notice the list—

Mr. Engstrand: Excuse me. Do you want to check —I notice that on that handwritten list that you use, you had done somewhat the same thing.

Mr. Bowles: Well, I was going to suggest to the Court, if the Court take a combination of the two lists, they can probably get not only an identification of the claimed list, but also where there's sub-basement numbers—I think we have given the Court the sub-basement numbers on the handwritten list that I've just given the Court?

The Court: Yes.

Mr. Bowles: See "S.S.B." and the number?

The Court: Right. 1197?

Mr. Bowles: Yes.

By Mr. Bowles:

Q Mrs. Smith, you have in front of you still, I believe, Exhibit HHH. Item 20 in 'HHH,' if you look at the tabs, is a jardiniere but in the nature of a planter. Do you find that?

A Yes.

Q That's down in the G Street warehouse locker, isn't [2085]
it?

A I think it could be.

Q Let me show you a picture.

A Looks very similar to one down there. However, I've seen at least 30 of these in my past few years, and I'd like to see a photograph of it before I say so definitely.

Q There's the photograph of the one in the locker.

A Yes, that's either that one or one identical to it. I'm sure it must be the same one.

Mr. Bowles: Show the Court the photograph.

The Court: That's this one?

Mr. Bowles: Sure.

The Court: I think we have a photograph.

Mr. Bowles: In your collection.

The Court: Yes.

By Mr. Bowles:

Q Same group of pictures. Now, Mrs. Smith, I'm not sure I follow what Mr. Engstrand has done on the list we just spoke of. Is it correct that you are not claiming this planter that's a jardiniere that's down in the G Street Warehouse?

A Yes.

Q You are not claiming it?

A Right.

Q If I have understood the list that was prepared, that was the list of items that were claimed that you are giving up a claim to?

Mr. Engstrand: I'm not familiar with prior lists. All I know is— [2086]

Mr. Bowles: Your list.

Mr. Engstrand: Oh, yes.

Mr. Bowles: Do we want to mark this in some fashion, put it in the book?

Mr. Engstrand: Probably.

The Court:. Let's call this 'HHH-E.' Now, you may quarrel with my identification, but I use different types of memory signals. I'll call this "Engstrand made."

By Mr. Bowles:

Q So, just so that we are clear, Mrs. Smith, you are not claiming No. 20 in this book, this auction book?

A That's right.

Q So, if it is on a G Street list it shouldn't be? I don't know whether it is or not—I'm just saying that if it is it's inadvertently on there?

The Court: Let me just get a picture so that I can nail it down with certainty. Off the record.

(Discussion off the record.)

By Mr. Bowles:

Q All right. For the record, 53A is a list that was put in, and reads, "G Street warehouse items not claimed by Mrs. Smith." Now, I ask you, Mrs. Smith, if that item is on that list—that item being No. 2 in 'HHH'?

A I don't think so.

Q Sorry?

A I don't think so.

Q So it properly should be added to that list? [2087]

A Yes.

Q May we have the witness just write the description on there, on that list—would you put please, Mrs. Smith, whatever description is appropriate in No. 20 in the Jean Owings auction book, please, so we can identify it?

The Court: You're not adding it to this?

Mr. Bowles: No.

Counsel, may I put 20 on here from the Jean Owings auction book?

Mr. Engstrand: Sure.

By Mr. Bowles:

Q Now, if we can move ahead to Item No. 71 for just a moment, Mrs. Smith—that's the fireplace that you have now withdrawn your claim on—just so we're clear: That's the fireplace in the living room, isn't it?

A Yes.

Q 71 is the living room fireplace. Turn to 73, please, Mrs. Smith. This is a pair of chenets that you are shown on the same picture in front of the fireplace. Are those in the sub-basement?

A There's a pair that is very much like these. I believe that they probably are these.

Q And am I correct that you are not claiming that pair in the sub-basement?

A That's correct. I never claimed those.

The Court: What was that, Mr. Bowles?

Mr. Bowles: This is a pair of chenets, Item No. 73. It's Exhibit 33, No. 1377, I believe. [2088]

By Mr. Bowles:

Q Mrs. Smith, what I want to clarify on that: Are you satisifed in your own mind that the ones in the sub-basement are those shown in the picture and described in the book?

A Well, I'm satisfied. I do want to say one thing, though, that there are many, many of these. I probably have seen at least 15 pair identical to this in the last five to ten years. So, I'm reasonably sure that they are, because I don't know how, where they came from, unless they came from the auction. But I cannot say categorically because there's so many of these made alike.

Q Well, if there are many of them made alike, and you've got one pair down there, and there was one pair bought at the auction by the hotel, that's good enough, isn't it?

A That's the basis that I am making the statement that I believe them to be the ones. And the same thing would be true of the fire screen.

Q Where is the fire screen located, do you know?

A In the sub-basement.

Q All right.

A That's No. 72. I probably have seen a hundred of those in the last three years.

Q Do you have any idea offhand, Mrs. Smith, which number in the sub-basement list that would be?

A I don't have my sub-basement list, but I think you'll find it on the list that it was not claimed.

Q Could we take just a moment to run through and identify on 33, please. [2089]

A Yes.

Q Mrs. Smith, look at the last page of that, and maybe tell us if that's the group that you were talking about—last page of 33.

A Yes, 1377, brass fire screen with brass cupids, chenet, three pieces.

Q The numbers that you make reference to on that list, Mrs. Smith, were the numbers that were put on when you and people helping you went through and just inventoried?

A But "1377" is the number I arbitrarily applied to that particular item.

Q So you ought to find a fire screen down there that has a "1377" sticker on it?

A I would hope so.

Q Now, let's turn to item no. 74, please. If you don't have it, we'll have to look at it in the book. You don't have it in that book, because we haven't been able to identify it.

A Yes, I have item 74.

Q Do you know where that is?

A What does it look like?

Q Mrs. Smith, hold on just a second here. I may catch up with myself. Mrs. Smith, turn to 79. I couldn't read the writing on this page, and I think my summary sheet probably should be changed. Where you see '74' that should be a '79.'

Do you find that, Your Honor?

The Court: Well, I found 74.

Mr. Bowles: Well, it's not in question. This [2090] should be 79 here instead of 74.

Mr. Engstrand: On your sheet, yes.

Mr. Bowles: I misread the writing. Now, 79 we have in the book.

Mr. Engstrand: Are you lying to us?

Mr. Bowles: Sorry?

Mr. Engstrand: Are you lying to us?

Mr. Bowles: No, I got it right here.

Mr. Engstrand: Oh, you just made a mistake—couldn't read your writing?

Mr. Bowles: No. Just bad eyes.

By Mr. Bowles:

Q Did you find the breakdown for No. 75 in the book? Look in the book, Mrs. Smith, or in the copy of 'HHH' that we have in front of you there.

A Uh huh.

Q 79 is a Dresden porcelain figural group. Do you know where that's located today, or whenever you last saw it?

A I may have seen that, but I don't recall it.

Q Is that in one of the vitrines?

A I don't recall.

The Court: Could I see a color photograph of that?

Mr. Bowles: Your Honor, we have color photographs of some items such as that, but not all of them apparently.

Mr. Engstrand: Mrs. Smith asked me to get an Exhibit—and, I assume, might help her. [2091]

The Witness: Yes. If you would give me my claimed items in the public area of the hotel, I'd be able to answer your question, Mr. Bowles.

Mr. Bowles: I believe it's No. 20.

Mr. Engstrand: Is this the ones that were loaned?

The Witness: Yes

Mr. Engstrand: 28.

Mr. Bowles: 28D?

The Witness: D, the last one.

By Mr. Bowles:

Q 28D?

A Yes, that would be the last page. Do you mind asking your question again now that I have the list in front of me, Mr. Bowles?

Q Yes. I simply inquired if you knew where the particular one shown in the auction is?

A No, I do not. It might be in the second floor vitrines, but I don't know.

Q Are you able to tell from the descriptions that you give on Exhibit 28D whether it is one of those that you are claiming?

A No. These were personal ones bought the years indicated, and it could not have been out of the auction, so it wouldn't be one of these.

Q And this wouldn't be in one of the vitrines upstairs?

A It could be. I just said I don't know. It might be.

Q By "upstairs" I meant the 1901. [2092]

A I don't think so. I'd have to look at the pictures again to be sure.

Q Let's jump over for now, Mrs. Smith. Let's move on.

Mr. Engstrand: What pictures, Mrs. Smith?

The Witness: Taken in the apartment of the vitrine. I have no recollection of it ever being in the apartment. But he's asking me, and if he wants me to look at the photographs—

Mr. Bowles: Well, why doesn't she do that at her leisure?

The Court: What was the disposition of 73—that we decided was no longer claimed?

The Witness: No, it never was claimed.

The Court: It never was claimed. All right.

Mr. Bowles: 79, we have not identified the location of it, Your Honor. We're going to move on to No. 80 in the book.

By Mr. Bowles:

Q Mrs. Smith, are you able to tell us from that description where that one is?

A I'd have to have the photographs of the vitrines on the second floor to tell you if it's in the vitrine or not. And I'm not even sure I could do it with that because there isn't a photograph in the Auction Brochure of Item 80.

Q Well, let me show you the photographs we do have of the Vitrine Items.

A Good.

Q Is it in there? I don't want you to guess, Mrs. [2093]

Smith.

A I don't know.

Q Let's not guess then. No. 81, Mrs. Smith, is the Thomas Creswick painting we talked about up in the dining room.

A Yes.

Q And that was not on a claimed list, that was on your non-claimed list of the dining room?

A Yes.

Q Let's turn to 254, Mrs. Smith, just briefly. Those are the lamps up in the small bedroom that we've spent a lot of time on already; is that correct?

A Yes.

Q And the ones that came from the second floor of the lobby, second floor of the hotel, up to the 19th floor?

A Yes.

Q No. 281, Mrs. Smith, so that we clear up the potential area of confusion, is a table in the dining room. It's a table of which the Court previously found some pictures.

A Yes.

Q Do you recall when Judge McCue showed us those pictures when we were talking about a two-tiered table?

A Yes, I do.

The Court: I didn't know I was so astute at the time.

The Witness: You're becoming an authority, Your Honor.

Mr. Bowles: The only error you made is that you had it on the wrong invoice. You knew where it was [2094]
Going to go, but you had the wrong invoice.

By Mr. Bowles:

Q Now, turn to Item No. 288, please, Mrs. Smith. Now, Mrs. Smith, this describes a pair of Louis XV style gilt bronze andirons, phriform finial on uniform standard. What does all that mean, if you can understand it? I don't what you to guess. But if it's something you understand, go ahead and tell us.

A Yes. I'm not sure you'll understand my explanation. I understand what it means—would you like me to try to explain it?

Q Let me withdraw the question, that's the simplest way. Now, would you please, Mrs. Smith, turn to page 98 in the book, that is, the auction book—and if the court would turn there also it would help.

The Court: I'm doing the best I can, Mr. Bowles.

By Mr. Bowles:

Q You see a picture there, Mrs. Smith, that looks like the dining room.

A Yes.

Q And you see at the fire a pair of andirons?

A Yes.

Q These are a pair of andirons that are partially obscured by the chairs; is that correct?

A Right.

Q And the one on the right-hand side, you can see the top that looks like it has like an acorn, and then comes down into the rather large base—are you following me? [2095]

A Well, I'm following you, but to me it looks like those are not a matched pair, that they're two different—that they've put one of one kind and one of another.

Q Well, Mrs. Smith, you are looking at the one on the left-hand side whre you see the female mask—

The Court: The Cherub?

By Mr. Bowles:

Q The Cherub?

A Yes. But you can't see anything but that. And the other one, you can't see the Cherub.

Q But, signficantly, you can see the Cherub is holding something in its left hand, can't you, like a cane, maybe?

A Looks like something.

Q All right. Now, let me show you some pictures of the andiron set you have in the living room. First, let's show you this picture, just shows the tops of the two you have in the living room.

A Yes.

Q Looks like the same tops shown in the book, doesn't it?

A It's very similar.

Q Let me draw your attention then to some of the close-ups of the Cherubs in the apartment. And you see that they are seated in approximately the same position, and have the same kind of a cane effect which you are able to see in the dining room.

A I'm afraid my eyes aren't that good, Mr. Bowles. I need your young eyes. Do you have your magnifying glass? [2096]

Q I'll lend you my eyes, but I can't divorce them from what's behind them.

A I'm sorry—you don't have it there—I really can't see that well, I'm afraid.

The Court: Maybe you can use this as we proceed, Mrs. Smith.

The Witness: Thank you very much. Can I have the picture again, Mr. Bowles?

By Mr. Bowles:

Q Right. You are welcome to look at any of those half a dozen of them there if it will help you.

A Well, the one in my apartment seems to have a drape of fabric they're holding. I really can't tell

what the Cherub is holding in the Jean Owings dining room. It doesn't look like a drape; looks more like a spear, or a shaft, or—

Q Mrs. Smith, I think maybe we can solve the problem by reference to Exhibit 61, which is your back-up, if I can identify it.

A Just can't see them well enough.

Q Let me show you 61, the Exhibit is Part C of 61, and show you what you submit as back-up for that andiron set.

A Uh huh.

Q Do you suggest that it is your position that that andiron set came from Virginia McLaughlin, and that you paid $100 for it?

A No, that's a different one. I have another andiron set. This would have been in miscellaneous paintings, rugs, books, figurines, and other miscellaneous items, $2,600. I [2097]
don't know what I paid for it. I don't remember it at this time.

Q Oh, Mrs. Smith, the back-up for the andiron set which you've attached, were it says, "original French andiron set from Virginia McLaughlin for $100" is not this set of andirons, but rather you are suggesting to us that the miscellaneous items relating to paintings, rugs, books, figurines and other miscellaneous items totaling $2,600 includes that set?

A Yes. I don't know how much I paid for it. It's been too long ago. I don't remember.

Q And you don't have any other back-up for that item, do you?

A Well, there is a letter somewhere. She didn't send them originally, and then she sent them to me at a later date. I have that sort of letter. I believe we filed it with you.

Q And on the first page of that Exhibit there is also a bill of sale that also makes reference to an original French andiron set, doesn't it?

A Yes, there was two.

Q And that's not the one?

A No.

Mr. Engstrand: What number in the Jean Owings is this?

Mr. Bowles: 288. It's in the dictionary.

Mr. Engstrand: Thank you.

Mr. Bowles: No. 288 is the one in question that $1,700 was paid for. [2098]

The Witness: I didn't understand—is there is question?

Mr. Bowles: There was no question, Mrs. Smith; I was telling Mr. Engstrand something.

The Witness: Sorry.

Mr. Bowles: Mrs. Smith, let's turn to item 306.

Mr. Engstrand: Would you mind, before you leave 288—did she say where this was, 288?

Mr. Bowles: No.

Mr. Engstrand: Did you ask her?

Mr. Bowles: No, I didn't ask her.

Mr. Engstrand: Okay.

By Mr. Bowles:

Q Suggestion has been made, Mrs. Smith, that you might know where this 288 is, this set of andirons?

A There are one, two, three, four, five sets of andirons in the hotel: The Ballroom, the Bordeaux Room, 1902, 1903, 1904—is that five or six—I would have to go and look at each of those to tell you. And I don't think I could still tell you, because I

really can't see the photograph well enough in the dining room to identify them.

Q And if it isn't in one of those places, Mrs. Smith, then you don't know where it is?

A Well, I know we had four andiron sets that disappeared from the storeroom, because I had to go out and buy other sets that I was planning on using in those areas. And I just can't tell you which ones they were at this time. But there were four sets plus some fire tools. [2099]

Q Do you have an insurance claim for those, Mrs. Smith?

A No, it was the Hotel's property.

Q Do you have any kind of report that you rendered to the Hotel for those, Mrs. Smith?

A Mr. Drack had some type of thing that he did when items were checked in, and he had a record of having received them, and we attempted to check them out to put them in the hotel, if they were not there, he filed some sort of report. I don't know if I ever saw one, but I head about the report.

Q You don't have a report, Mrs. Smith?

A I don't think I ever received any.

Q That was my question.

A No, I don't have.

Q Mrs. Smith, turn to No. 306, please.

Is the court with us on 306?

The Court: Yes, I'm there.

By Mr. Bowles:

Q Good, Fine. Mrs. Smith, this is a four piece French rouge marble and gilt bronze desk set. Now, French rouge we've talked about before—that means kind of an off-red or dark pink, doesn't it, with some white in it?

A No, it means a very dark red marble with brownish tones in it.

Q And has some white in it, perhaps?

A Occasionally has a tiny touch of white through it.

Q Going on to describe this particular item—is a pen well, two fluted round inkwells with leaf-tip chased and hinged covers on animalistic feet, oblong paper weight, rocking [2100]
blotter, and stamp moistener. That sounds an awful lot like the desk set on Mr. Smith's desk upstairs, doesn't it, Mrs. Smith?

A I'd have to look at it, but it sounds like every antique desk set I've ever seen, as far as the pieces go, not the color.

Q Well, here is a picture of the set that you say is on his desk.

A Right.

Q And if the court will turn in the book that we have to page 111, 112, and 113, you will see the desk and the desk set. You will see the desk set.

A Uh Huh.

Q On top of the desk. And you see the same type of handles on the desk set as the one on the desk upstairs, don't you?

A Let me get my glass again. It looks very much like that set.

Q And, Mrs. Smith, if it is that set, that would make the back-up that you have provided in Exhibit 60-F inaccurate, wouldn't it? What I am saying is that—

A Yes, it would, unless they are identical sets. And I don't at all recall that being the case.

Q Let me show you my copy of 60-F and ask you to find the back-up in there so that we can identify it.

It's No. 29. It's towards the end.

A Yes. Well, I would like to go and look at it to see if it's marked "Tiffany." But it certainly appears to be that [2101]
desk set.

Q All right. The document that you submitted as a back-up is a George Georges' invoice?

A Right.

Q Dated February 15th, 1966?

A Yes.

Q And it makes reference to a Tiffany desk set for $125?

A Yes.

Mr. Stechel: Could I see it?

Mr. Bowles: Yes.

Mr. Stechel: Sorry to interrupt. I wanted to see the back-up on this. Your Honor, if I might—I know it's not my examination at the moment—but the trustees would like to, in view of this very good demonstration, in our view, of the widom and rationale which goes behind the century-long development in the law, the common law and the law of this state, and of all the states that I know of, and the Federal Courts, that bills and invoices are hearsay.

We now have a document submitted in alleged back-up to the purchase of this item, which is a Tiffany desk set, and the witness now is compelled to herself admit that that is not the desk set, or does not appear to be, if characterizing what she said correctly.

I move, your Honor, I renew the motion of the trustees to strike out all of the hearsay back-up at [2102]
this time. I know the Court has previously ruled. But this is just the reason why the law of evidence is the law of evidence.

The Court: I understand, Mr. Stechel. Again, I understand how the law of evidence developed. I recognize that at one point in time we used to drag people by the heels and dunk them in pots of water, and if they survived, that means they told the truth, after being subjected to trial by ordeal. But we have come a long way.

Mr. Stechel: What I am saying, the modern law of evidence is that invoices are hearsay. That they are hearsay, that the item mentioned was in fact sold. They are hearsay as to the amount of sale. They are hearsay as to the date. They are hearsay completely because it's as if George George is here to say all of this stuff, all of this is correct—and Mr. George is not here.

The Court: Yes, I understand that, Mr. Stechel. And what we will do, we will give that the appropriate —

Mr. Engstrand: The next time I hear this motion—

The Court: Wait, wait.

Mr Engstrand: I would appreciate having a citation to one of these states.

Mr. Stechel: The brief, Your Honor, that I submitted—not a very lengthy one—to Judge Enright cites —I think the name of the case was Ploneley vs. Reasoner, one of them, that went to the California [2103] Supreme Court. And that was only one of them cited.

Ploneley, P-l-o-n-e-l-e-y, is the plaintiff's name in that case. And it was decided by the Supreme Court of California in the 1960's.

Mr. Engstrand: Don't shout. I appreciate the citation. I just asked for a citation.

The Court: All right, Gentlemen. Your motion is denied.

Mr. Stechel: Exception.

Mr. Bowles: May I contnue?

The Court: Yes, you may.

Mr. Bowles: Mrs. Smith, I want to back up just for a moment to Item No. 288. Sorry, Your Honor.

The Court: Well, now, before we leave Item 306—

Mr. Bowles: Yes. Do I hear a motion to withdraw the claim?

Mr. Engstrand: She has said she wants to check and see if it is a Tiffany.

The Witness: I would also like to be sure there isn't one in the lobby on the desk, Your Honor, like this, because as I've told you, these things are frequently —they are reproductions—they are not period pieces, and they are reproduced and copied over and over again.

The Court: Well, I stand corrected. I misunderstood.

By Mr. Bowles:

Q Now, back up to the andirons for a minute which are [2104]
No. 288, please, and we are backing up again to the back-up data that you have submitted. It's 288 in the book, but I am looking this time at Exhibit 60B.

You made reference a minute ago, I believe to a letter attached to the back-up. Let me first show you the bill of sale.

A Yes.

Q And it's a two-page document as it was before?

A Yes.

Q This is the letter to which you made reference from Virginia?

A No, no, there was a letter attached which she said she was not sending the andiron set, and then another letter where later she included the andiron set.

Q Now, this inventory that I am looking at is attached to a letter from Virginia McLaughlin, isn't it?

A Uh huh.

Q Now, is that inventory the same inventory as is typed up?

A Well, not necessarily, because we had half a dozen handwritten ones, and where she put things in, and took things back, and would decide she wasn't going to sell something, and then she was. But the final sale of that particular item, she decided at a later date that she wasn't going to sell it. I should have included one that said, I'm not including it—"P.S. I'm not including the andiron set," and then there should be another letter in which she says, "I'm now including the andiron set." [2105]

Q Well, Mrs. Smith, I will read to you from the typed list and then from the inventory that is attached behind it.

Mr. Engstrand: What's the document?

Mr. Bowles: 6B.

The Court: 6B or 60B?

Mr. Bowles: 6B this time, Your Honor. Changed to Item No. 28.

By Mr. Bowles:

Q Is there any question in your mind, Mrs. Smith, that the handwritten inventory pertains to the same items that are typed on the bill of sale?

A Well, it pertains to some of them, I'd have to check it out to see if it's an exact copy of it.

Q Let's just look at a couple of items on here. The first is a tape that is attached.

A Right.

Q It's an adding machine tape?

A That's correct.

Q There's written on the adding machine tape, "andirons, $100," correct?

A Right.

Q And then on the handwritten inventory on the second page—this right here—"original French andiron set, $100"?

A Right.

Q Okay, that's all. That's attached to your back-up on 6B?

A Yes.

Q Mrs. Smith, I want to show you a brochure I think [2106]
you have probably seen before in its original form.

A Yes.

Q Now, that one bears "Little America Westgate," but I think if you look at the pictures, and I will represent that I have compared them, the same pictures showed up on this particular brochure when it was referred to as the Westgate Plaza, do they not?

A Yes.

Q Counsel, I have a copy of the old one where the pictures are the same—whether it's in Spanish, or Mexican, or American—here's one in Spanish if the Court wants—

The Court: I'll take that one.

The Clerk: It will be defendants' III.

By Mr. Bowles:

Q Mrs. Smith, the document that we just had marked shows at one point a picture of a Boulle clock. Do you find that?

A Yes.

Q And, Mrs. Smith, that clock was at one time on display in the hotel, as shown in that photograph?

A That's right.

Q And that clock was taken up to the 19th Floor, wasn't it—1901?

A I don't recall that. It may have been. I know it was broken, and it was taken to be repaired, and was never repaired. It's still in two pieces.

Q Where is the clock now?

A It's in the sub-basement, still broken in two pieces. [2107]

Q I take it you make no claim to that?

A That's right. It's on my "not claimed" list.

Q I want to have marked, Your Honor, another set of documents, another book, that is, to the extent that we can determine it, the items that are missing.

The Court: This is something about this Boulle clock?

Mr. Bowles: She's not claiming it. It's in the sub-basement. That's the bottom part. The top is missing.

The Court: Right. I found it. But, put in the record that Mrs. Smith is not claiming it. Doesn't show up in the book.

Mr. Bowles: It does show up in the book. It's 142.

Mr. Ardoin: And it's in the sub-basement.

The Court: All right. I see now, Mrs. Smith, when you say the top was broken off—now I understand.

The Witness: Yes. It was knocked off the chest at a cocktail party that was held in that area.

Mr. Bowles: I believe this will be Exhibit JJJ.

Mr. Engstrand: May I inquire of counsel for the purpose of determining its relevance?

The Court: Why don't you discuss it, and Mrs. Smith and I will take a break.

The Witness: Thank you, Your Honor.

(Recess.) [2108]

The Court: Now, Gentlemen, as always, the clock is running on us. Mr. Bowles, how much longer do you figure you have with Mrs. Smith?

Mr. Bowles: Mrs. Smith, you are taking the green book. Do you want to do that? Is that what you want?

Mr. Engstrand: Did you make some notes in the green book?

The Witness: I think I did.

Mr. Bowles: Let me give your counsel the black one to follow along with.

Mr. Ardoin: She may have made notes in the black one.

Mr. Bowles: I don't think so.

The Court: Is there another question?

Mr. Bowles: I think that any objection there may have been, was—

The Court: Well, there was a question as to relevancy of another item that you were going to mark?

Mr. Bowles: Yes. He said that he wanted to ask Mrs. Smith if she knew where any of these items were that were missing. And I tried to make a deal with him to give us part of it if we could locate any of them, but he wouldn't do that.

The Court: Sounds reasonable to me.

Mr. Engstrand: I think we can go through it rather quickly, I imagine.

The Court: Has it been marked?

Mr. Bowles: I believe we have marked it as 'JJJ,' [2109]
Your Honor.

The Court: All right, 'JJJ.'

Mr. Bowles: And I believe the Court has a copy of it. This one.

The Court: All right. 'JJJ' is a volume entitled "Auction Items Missing." Now, I understand the format of the book. It's the items that are marked.

Mr. Lincoln: Starred.

Mr. Bowles: Right, yes. But they're tabbed also, because a couple of items may have—

The Court: So the tab corresponds with the item number?

Mr. Bowles: Giving the Court our copy of the handwritten list of the items, and ask that that go in the front of the book. That's the list of the items that are in the book, and what was paid for them, the total missing items. That should say 53,787.

The Court: Who is the person who drew that list?

Mr. Bowles: You understand now why I can't read his writing.

The Court: Is that you, Mr. Ardoin?

Mr. Ardoin: I refuse to answer. I'm taking the Fifth on that.

By Mr. Bowles:

Q Mrs. Smith, the first is Item No. 10. Do you find that?

A Yes. [2110]

Q And you have a picture of it there?

A Yes.

Q Do you know where that is?

A I have recollection of it being brought from the second floor elevator lobby to Apartment 1900, and it had a stripped screw, I guess you would call it, in the bottom of it that needed to be replaced. Last time I saw it, that I recall seeing it, was in 1900.

Q That's 1901, your apartment?

A Yes.

Q Is it there today?

A Well, I hadn't thought about it until I looked at that picture.

Q Where was it when you last saw it there?

A I think it was laying in the middle of the living room floor, turned upside down.

The Court: I suppose it could be in a shop someplace getting reworked?

The Witness: That's what's going through my mind, that maybe it went down to the commissary to be repaired, or somewhere, and hasn't—or, housekeeping.

By Mr. Bowles:

Q Down to Mr. Kropp?

A Could be.

Q Let's turn to No. 4, Mrs. Smith. It's a pair of French bronze crystal six-light girondoles, shown on a picture there.

A There are two pairs of girondoles that were bought [2111]

in the Jean Owings sale, as I recall. And one pair of them is in the lobby on the gold consoles; one of the pair is on the piano in the Fontainbleu Room, or was on the piano the last time I dined in the Fontainebleu Room.

So, I'm not sure—to answer your question—whether this No. 14 is the pair in the lobby, or the pair that one of a pair is being used on the piano in the Fontainebleu Room.

Q We have a picture of these on page 8 of the book. And if you turn to No. 183, I believe, in this volume we are looking at—hoops, that's not right—not 138. Hold on just a minute. Withdraw the last question. Can't find it in here.

A Mr. Bowles, this is shown as missing on your list; but they were in the lobby of the hotel very recently when I walked through.

Q Mrs. Smith, let me clarify the record so we don't have any misunderstanding: When we say "missing" on this list all we are suggesting is that we have been unable to identify those items.

A I thought you were, when you say "missing," you meant missing from the premises.

Q If we knew where they are, I wouldn't have to ask you where they are.

The Court: Mr. Bowles again left me in a confused state of mind.

Mr. Bowles: All right. Well, if I understood what Mrs. Smith said on the last, No. 14—

The Court: She said that she knows where they [2112]

physically are, or she knew where they physically were.

Mr. Bowles: She said she knew where two were.

By Mr. Bowles:

Q And what I was looking for Mr. Ardoin has just pointed out for me. It's 445, all the way to the back of the book, Mrs. Smith.

A Right. Though there's—as I said before, there's one pair in the lobby. I saw them quite recently, within the last 30 days. And then there's one-half of a pair on top of the piano in the Fontainebleu Room. I don't know which is which at this time.

Q Did either pair have these light shades on them that we see on 445? That's, of course, not the proper term, but I think you can understand what I am referring to?

A Well, I believe that the ones in the lobby look like 445 without the shades.

Q So would it be your best recollection No. 14 would be in the Fontainebleu Room, or at least one of them?

A Was. I haven't been there for several months.

Q No. 39, Baccarat Crystal 12-light chandelier.

A I just don't remember that.

Q See the picture of it, behind it?

A There is a Crystal Baccarat Chandelier in the foyer entrance to the Fontainebleu Room, but it doesn't

strike a responsive chord with me that this is it—although it is a Baccarat.

Q So I take it—

A I'd have to look to see. [2113]

Q You don't know where this one is at present?

A No.

Q No. 40, four, three-light wall fixtures. Apparently go with the—

A Is there a picture?

Q —Go with the chandelier. If you look, I think you can see there is a picture up there, there on the side of the Trumeau mirror there, if you look at your book I think you will see a better picture of it. Do you have your auction catalog there?

A Oh. I don't remember those.

Q This is a Linke signed table, marble topped with molded border, small drawer.

A I'm afraid without having a photograph—is there a photograph?

Q I don't believe there is, Mrs. Smith. You don't know where it is?

A No.

Q The figures written to the side, incidentally, your Honor, are the prices as reflected on the invoices.

A They are not?

Q They are.

A Oh.

The Court: That would be "1,800," meaning eighteen hundred dollars?

Mr. Bowles: Yes.

By Mr. Bowles:

Q No. 60, a large item of Louis the XVth style rosewood [2114]
Bombe Commode by Sormani. Is that how it is pronounced?

A Yes.

Q Paid $7,500 for that. Do you know where that is, Mrs. Smith?

A No.

Q No. 82, Meissen porcelain urn and cover.

A 82?

Q Yes, $700 urn, with crossed swords on it in blue. There is no picture of it in the catalog.

A I don't remember that at all.

Q No idea where it is?

A No, I have not, none at all.

Q 89, a piece of art that there is a picture of.

A I remember that picture.

Q Do you know where it is?

A No.

The Court: Excuse me, Mrs. Smith—did you say you do?

The Witness: I remember it. Yes, I remember it in the auction, and I remember it in Mrs. Owings' home, seeing it there.

Mr. Bowles: If the Court's copy didn't come out, that's a "750" beside that.

The Court: Yes, I have it.

Mr. Bowles: Double check it on the front sheet.

Mr. Engstrand: Item 89, 750?

Mr. Bowles: Yes. [2115]

By Mr. Bowles:

Q No. 91, which ought to be $900, Louis the XVth style Acajou table, bronze mounted.

A Do you have a picture of that?

Q No, Mrs. Smith, unless the catalog indicates a picture of them, we don't have a picture of them.

A I just don't believe that there would be any way that I'd recall.

Q That would be a table that would have a green onyx top; is that right?

A That's right.

Q And would have bronze around the outside?

A Uh huh.

Q And you have no idea where it is?

A No.

Q The next is No. 157, which is a pair of Samson soft paste bleu porcelain urns and covers with Sevres marks on them.

A Aren't these the same ones that we talked about before? Because I only recall one pair of—

Q Look in your book at 254, Mrs. Smith.

A Urns.

Q No—look in the catalog at 254, and see the different set.

The Court: This is 157 in the catalog?

Mr. Bowles: Yes.

The Witness: Yes.

By Mr. Bowles:

Q See that there, two sets, Mrs. Smith? [2116]

A Yes. I didn't remember that there were two sets gone. Oh, those were urns, and the others were lamps.

Q One is a small bedroom, 254, the lamps?

A No, I don't remember those at all.

Q Mrs. Smith, I want to show you on 157, a couple of pictures.

A Uh huh.

Q Picture of the jardinieres or urns in the entry way.

A Uh huh.

Q The blue pardiniere urns in the entry way, 1901, and ask you if those don't show acorn knops and dome covers?

A Almost all of these have that type of finial.

Q Okay. In-curving cylindrical necks?

A Let's go back till we find the description.

Q I'm reading it to you—157—it's on page 69, Mrs. Smith.

A I have too many things to hold.

Q Now, we started to agree that we had acorn knops and dome covers—don't they?

A Right.

Q They have in-curving cylindrical necks?

A Yes, that would be true of all urns.

Q And they have ovoid body fine polychrome painting figures within landscapes and bocages?

A Right.

Q They have gilt borders?

A No—excuse me—yes.

Q Overlaid with turquoise jeweling? [2117]

A No, they have no turquoise, and they have no jeweling.

Q They have bronze square feet with in-curving corners?

A No, they don't have square feet, and they are the wrong color. These are celeste blue, or Marie Antoinette blue.

Mr. Eng rand: Which, these?

The Witness: Mine that came from Fred Sarwin are a different blue than the ones described in the catalog.

By Mr. Bowles:

Q Different from the paste bleu described in the catalog?

A Right. These are called celeste blue or Marie Antoinette—mine, from Mr. Sarwin—and they have no jeweled stylized flower heads, whatever that means. And they do not have a fancy Sevres mark, Mr. Bowles. They have no marks.

Mr. Engstrand: Which is "they"?

The Witness: Mine have no mark on the bottom of them. They don't have a Sevres mark.

By Mr. Bowles:

Q And the back up that you have provided for those would be—

A Fred Sarwin. $1,200 pair of urns and a small bowl. And it would be highly unlikely that they would be 19½ inches. I don't think the height of them—but I'm quite certain that it would be miracle if they were the same height.

Q You say the back up is Fred Sarwin or yourself?

A I beg your pardon? [2118]

Q The back up is Mr. Sarwin?

A Fred Sarwin for a bowl that's not there that's been lost, and that pair of urns.

Q Well, is this Mr. Sarwin's invoice that you refer to?

A Yes.

Q Doesn't that say "Sevres urns" on it?

A Yes. But they do not have a Sevres mark on the bottom.

Mr. Stechel: May I see? Sorry to interrupt, Paul.

The Witness: The Sevres mark on the bottom is an "S" mark, Mr. Bowles. And lots of Sevres was never marked.

Mr. Stechel: Your Honor, if Mr. Sarwin was here we'd ask him what he meant when he said "a pair of Sevres urns and bowl." I would submit, Your Honor, that that invoice, this kind of back-up again—you see the evolvement of the rule of evidence. What did Mr. Sarwin mean? He's not here to be examined.

The Witness: Your Honor, they are Sevres; I'm just saying they have no "Sevres" mark.

The Court: Mr. Stechel, I understand your position. It would be nice if we had Mr. Sevres here. He could tell us himself.

Mr. Engstrand: He probably wasn't there the day they were made. We'd have to have the guy who made them.

Mr. Stechel: Your Honor—at the very least, I [2119]

would hope, Your Honor—I don't mean to belabor it—but that, of course, is the way the matter is before the court. And the underpinning of that rule of evidence is not simply speculation, but the confrontation principle.

The Court: Certainly, it is just a simply matter to just take that urn, and turn it upside down, and see if there's an "S" on there, and have Mrs. Smith point out—

Mr. Bowles: May we have it brought down here? We'll do that for the pair of them.

The Witness: Be happy for you to.

The Court: All right, let's have a little test.

Mr. Bowles: Test of what?

The Court: Of Mr. Stechel's comments and Mrs. Smith's comments. Mrs. Smith says that is not the urn.

Mr. Engstrand: Let's measure it.

The Witness: Measure it. The color is wrong.

The Court: It's 19½ inches. Turn it upside down. That's physical evidence.

Mr. Stechel: I think that's a fine test, except, Your Honor, it would still be better if we had Mr. Sarwin. He says he wrote that invoice. When you look at that invoice all you see is, says, "Sevres urns." He doesn't say one way or the other if it's an "S," or the exact height, or what color it is. And I mean, the difference between Marie Antoinette blue, or Joan of Arc blue, or Howard Stechel blue. [2120]

Mr. Engstrand: Or Howard Stechel tall—13 inches.

Mr. Stechel: I mean, what do we get from this? Mr. Sarwin could say—"Mr. Sarwin, did you ever sell such an urn to Mrs. Smith? When did you sell it? What did it cost? Did it have this marking?"—but Mr. Sarwin is not here.

The Court: The issue is whether or not that's the urn that was part of that group of objects that was sold in the auction.

Mr. Bowles: They can be brought in here, I take it, and we can all examine them to our hearts content.

The Court: Probably we have to take it down; it's liable to fall and break. Can't we just turn it upside down and take a picture of it, or something? Do you think perhaps we could just have it brought down, very carefully?

Mr. Engstrand: See if Mr. Ardoin—he would be the expert—can you take care of that?

Mr. Ardoin: I'm not going to take the Sevres urns. It's out of her apartment. I'll bring some of the other physical objects, round up some of the things in the common areas if you want to, but I'm not going in her apartment.

Mr. Engstrand: Can we get it down here, Mrs. Smith?

The Witness: I would be glad to bring it down, Your Honor. I'd be delighted to. [2121]

Mr. Engstrand: How heavy are they?

The Court: Can we get Mr. Donathan to bring them down?

Mr. Bowles: I'm sure he's available, Your Honor.

Mr. Ardoin: Mr. Donathan can bring one, and Mr. Kropp can bring the other.

The Court: Let's move on.

By Mr. Bowles:

Q I think we are on 183. You can look in the green binder in front of you, Mrs. Smith, and follow along if you want to—or turn to the item in the catalog, the other one. This a pair of French Louis XVth Acajou side tables.

A Yes. They were in the lobby on either side of the sofa. I think if you would bring that brochure I could show them to you.

Q We just had that marked.

Mr. Engstrand: What brochure?

The Witness: The Westgate Plaza Hotel brochure.

Mr. Engstrand: The purpose of that again? You know, sometimes we do read the record.

The Witness: Well, unfortunately, it's not too good a picture. But they're right here.

By Mr. Bowles:

Q All right. You are indicating that they are located at a point which be the north end of the lobby to either side of a pair of couches shown in Exhibit III?

A They were.

Q They were. [2122]

Mr. Engstrand: When the picture was taken?

The Witness: Right.

Mr. Bowles: No. 189. Louis the XVth style Acajou side table.

Mr. Engstrand: 189?

Mr. Bowles: Yes.

Mr. Engstrand: Wasn't that the one we just—

Mr. Bowles: We just covered 183.

Mr. Engstrand: It's not on the list.

Mr. Bowles: Isn't it?

The Witness: I don't find 189 on the list.

By Mr. Bowles:

Q 183 is not on that handwritten list, but they are both in the book here.

A No, I don't find them on the list of items purchased.

Q You don't find which one—183 or 189?

A 189.

Mr. Engstrand: Let's start over again. We just got through talking about 183, which is in the book JJJ, but is not handwritten. And it probably should be added.

Mr. Bowles: I think so. That's fair.

Mr. Engstrand: Now we got Rick.

The Court: Mr. Ardoin, was that intentional?

Mr. Ardoin: I'm happy to add it to the missing items, Your Honor.

The Witness: Which one was that?

Mr. Bowles: The one we just talked about, 183.

Mr. Engstrand: The one you just pointed out in [2123]
the brochure.

The Witness: But it's not in this end.

The Court: But, you see, Mrs. Smith, it's missing from this list that was prepared by Mr. Ardoin.

The Witness: I see. I understand.

The Court: So now we have him caught in an oversight.

Mr. Lincoln: The lost is found.

The Witness: Do you find 189 on the items purchased?

Mr. Bowles: 189, I think, if you look at the invoice —

Mr. Engstrand: It's on 'DDD.'

Mr. Bowles: Which is the invoices.

Mr. Engstrand: —That she has—was that 'EEE'?

Mr. Bowles: He is looking at 'FFF,' I think. She was looking at 'LLL,' if she didn't find it on that.

Mr. Engstrand: Is it on there?

The Witness: No, not on 'FFF.'

The Court: On 'FFF,' 183 appears, but 189 does not.

Mr. Engstrand: Maybe this would be a good time, if you don't mind—I taped 'DDD' and 'FFF' and came up with $174,495 for 'FFF.'

And I've lost the tape, I guess—

Mr. Bowles: Are you lying to us, Paul?

Mr. Engstrand: No, I'm not lying. I just lost it. I never lie, I just misplace things. [2124]

Mr. Bowles: I was just parroting. I wouldn't accuse another attorney of that.

Mr. Engstrand: But the tape that I have misplaced for "DDD' was $183,000 and something. I don't know what that means, except that the 174,000 times five percent—if you can see my thinking—times five percent sales tax comes back up to about 183,000, which suggests that maybe 'FFF' was a final figure.

By Mr. Bowles:

Q Do you know where 189 is, Mrs. Smith?

A Did we find 189 on the list?

Q It's on the invoices.

A I don't know if we have got it. I don't know what it is, no, and I don't know where it is.

Q Now, Mrs. Smith, to avoid any uncertainty about that, if I can now find a list I was just looking at—if you look on 'EEE,' you, or whoever prepared that list, note that Mr. Kropp hadn't yet found 189, but also makes the same comment as to 148. Do you see that?

A Yes.

Q 148 in fact is the Sormani table that did come in, and it's up in the living room of 1901, isn't it?

A I believe that's the right number.

Q You can check me by looking at 66-S. I'll show you my copy of that to speed things up.

A Right. Not delivered. Must have been delivered later. [2125]

Q Must have been delivered. Okay.

A Uh huh.

Q But you don't know whether 189 was ever delivered?

A No, I don't.

The Court: I can shed some light on that by referring to Plaintiff's CCC.

Mr. Bowles: Right. That's the handwritten list, I believe?

The Court: Yes, that was apparently the furniture that was delivered by the Green Dot Custom Furniture delivery people. See that, 189, says, "side table," followed by a question mark.

Mr. Bowles: So does 148, which is the other one. So we are back to the same place as the last exhibit, 148 having been delivered.

Mr. Engstrand: The missing tape has been found. $183,843.

Mr. Bowles: 183,000—

Mr. Engstrand: $183,843.88. That's 'DDD.'

Mr. Bowles: Are you sure?

Mr. Engstrand: No, I wouldn't swear to it. That's my tape.

By Mr. Bowles:

Q Let's go on to 214, Mrs. Smith. This must be some bone china statues.

A Yes.

Q And under 214 is the Farmers Wife and the French Peasant? [2126]

A May I just tell you what I know about all of these, just save a lot of time?

Q Uh huh.

A There were a number of them purchased, and they were placed in the vitrines outside the Westgate room, and the Westgate bar.

Q Where Mr. Lee has his things?

A Yes, where he has his things. They were there for I don't know how long—probably Mr. Humphreys could tell you. And I came back, being away over a weekend, or a week trip, I don't remember—and they were gone. And I assumed that they had been taken out to clean the cases because they had taken them out before and cleaned the cases and the glass and put them back in. They're another one of our famous disappearing items in the hotel.

Q Does that apply to 216 also?

A It applies to all of the Royal Dalton dolls. I don't recall how many there were, but there were a number purchased in the auction.

Q Just follow me through the numbers, Mrs. Smith.

A I wouldn't remember them individually, Mr. Bowles. I could only tell you that there were quite a number, but I wouldn't have any individual recollection of each doll.

Q But by looking at the book that you have in front of you, 216 is a similar Royal Dalton figurine or statue, is it not?

A I beg your pardon?

Q 216 is within the same categorization as a bone china statue, statuette?

A 216?

Q Yes.

A These are all Royal Dalton dolls in this entire.

Q Just follow me through.

A All right.

Q 229 is the same, is a Royal Dalton doll?

A Right.

Q As is 221?

A Right.

Q As is 224?

A Right.

Q As is 229?

A Right.

Mr. Engstrand: Do you have 219 in your list?

Mr. Bowles: Yes.

The Court: Yes, he just skipped over that.

By Mr. Bowles:

Q As is 233?

A Right.

Q As is 236?

A Right.

Q And the extent of your knowledge on those is that the entire collection of those dolls or statuettes that were purchased were put in the glass display cases?

A Yes.

Q Outside the Westgate room?

A Right. [2128]

Q And you haven't seen them since they were taken out?

A I've never seen them since.

Q Now, 240, the landscape with figures.

A Do you have a picture of that?

Q No.

A Because I couldn't even hazard a guess without a picture.

Q So you wouldn't have any idea where that is from the description; is that correct?

A No.

Q You have several times indicated that you have trouble with knowing where these things are, what they look like, just based on the descriptions. That's a common problem with antiques, isn't it?

A Depends. If I've seem them a lot of times I would remember them. But if I saw them one time, and they were purchased in the auction, or in Mrs. Owings' home, and then never saw them again, it would be almost impossible to try to remember over that many years ago.

Q I'm not quarreling with how many times you have seen these things, but you have been through that home more than once, haven't you?

A Yes, I have.

Q In fact, at one point you attempted to buy the entire merchandise?

A I had an option to buy everything she had in the home at one time.

Q So you probably have been there what, four or five [2129]
times, looking at the objects?

A Not looking at the objects. I've been there socially in addition to looking at the items.

Q 244 is a 15-light candelabrum with a picture. Can you tell us where that is?

A I remember that, but I don't know where it is.

Q 261—it's a Louis the XVth Acajou chair, gilt bronze mounted.

A Is there a picture of that?

Q No, there isn't.

A No, I don't remember that.

Q 262—Rosewood bombe vitrine by Linke, with a picture of it on page 94.

Mr. Stechel: Is that $7,000?

Mr. Bowles: I believe that's what it says, $7,000.

The Witness: Yes. I remember that, but I don't know where it is.

The Court: Is that 7,000 or 1,000?

Mr. Bowles: 7,000, Your Honor.

By Mr. Bowles:

Q You have no idea where that is, Mrs. Smith?

A No, I do not.

Q Mrs. Smith, I have noticed going through many of these items missing that many of them are Linke—signed by Linke?

A I hadn't noticed that. I thought this was the first one. [2130]

Q All right, let's back up.

The Court: No, no, let's not back up.

By Mr. Bowles:

Q Well, my point is, Mrs. Smith, you have purchased many, many Linke items, haven't you?

A I have a great numbers of Linkes.

Q Do you have many Linke items in your home?

A Let me think. Are you speaking of my home in La Jolla?

Q Yes.

The Court: Well. just anyplace, Mrs. Smith.

The Witness: I have two Linke—a pair of Linke vitrines in my home in La Jolla, and one Linke tea table. I only have about ten antique items in my

whole house. That will surprise you. I brought them all down to the hotel.

Mr. Stechel: May I have that answer marked, please, Your Honor?

The Court: Yes, it may be marked. Let's move along, Gentlemen.

By Mr. Bowles:

Q What about the L. A. apartment, Mrs. Smith?

A I have a lot of Linke pieces in the apartment in L.A.

Q Anyplace else that you have Linke pieces?

The Court: In other words, what Mr. Bowles is trying to do, Mrs. Smith—he's trying to link you to the Linke pieces. [2131]

The Witness: He can do that. I've been trying to do them for 25 years.

Mr. Bowles: It's quite a tight link, Your Honor.

The Court: That's the whole issue, the missing Linkes—and you've got Linkes; and maybe you've gotten them hidden someplace?

The Witness: I understand the implication of the other identification, but I have none of these Linkes.

By Mr. Bowles:

Q 270, Mrs. Smith.

A I remember those, Mr. Bowles. They, I think, were bought by mistake. I think Mr. Smith must have been bidding on something else, because—

Q What happened to them?

A The last time I saw them they were in housekeeping, and we were going to make sofa pillows and do various little upholstering jobs with them. I don't know what happened to them after that.

Q Was that ever done with them?

A I don't really know.

Q 273 is the next one. This is a series of compotes, or, four of them?

A Yes I know about those.

Q Where are they, please?

A Two of them are in the bathroom of 1900, and I have two, four, six—I have six of them in my home. And I had forgotten these until we saw them here. They should have been put on my list. [2132]

Q They all belong to the hotel, don't they, Mrs. Smith?

A They do. Under the present agreed-to circumstances. Up until today I considered that they were mine, and that they were given to me from the auction.

Q Have you thought of any other items from the auction that you have in your home?

A No. But if I do, I'll tell you.

The Court: Mrs. Smith, this isn't your home on the 19th floor?

The Witness: No. I live in La Jolla, and I just spend some time down there with Mr. Smith. I planned originally that I might sell my home in La Jolla and move there.

The Court: I thought how nice it must be to live there. I thought you lived there, I'm sorry, I was a little surprised here today.

The Witness: No, not all the time, just very infrequently.

The Court: So then you wouldn't have any objection then, as a token of good faith, to just return these to whomever?

The Witness: No, of course not.

Mr. Stechel: Westgate. We paid.

The Court: Well, Mr. Stechel—

Mr. Bowles: Don't turn them over to Westgate, you'll get yourself a lawsuit.

Mr. Engstrand: I may ask Mr. Smith to return them. [2133]

The Court: Are they pretty thick? Can't be too big.

The Witness: Oh, no, they're tiny. They're just this high, Your Honor, and they're little glass plate in a little holder.

The Court: Good.

The Witness: And I could carry all of them very easily.

Mr. Stechel: Your Honor, I don't know what is going to occur here, but certainly we have all the equitable interest in this item.

The Court: Well, I would like to see something—I'm going to see a vase tomorrow, and urn, a jardiniere—whatever it is—a Sevre. And I'd like to see something else, too, so we have a feeling we're talking about real objects. And since it's got to be delivered, we'll deliver them in Court, and we'll make a judicial determination as to where they go.

So, could you have Mrs. Smith bring them in tomorrow?

Mr. Engstrand: Yes.

Mr. Bowles: That's eight of the—

The Witness: Two are in the Apartment, and six of them are in my home.

By Mr. Bowles:

Q Those are the items in No. 273 and 274?

A I don't know which number is which.

Q But, that's the eight of them? [2134]

A Right. I know which ones—the one on the far left is in the apartment.

Q Well, all eight of them are coming back. I don't care to identify them any further.

No. 275, Mrs. Smith, is another set of four French gilt bronze and crystal bowls.

A I don't know what those are. But they are the same thing we are talking about here. I think it's the same thing, isn't it?

Q Well, you've got 273, a series of compotes; 274 is a series of compotes; and 275 is apparently the first item in that photograph on page 95, and there are four of those also?

A Well, I really can't tell you which is which. I just know what I have. I don't know which numbers are applicable. They all have crystal bowls, though.

Q Well, when we see them we'll know.

The Court: Let's move on.

By Mr. Bowles:

Q 276—this is a pair of compotes, and I guess we are going to have the same problem there, Mrs. Smith.

A I wouldn't know which is which.

Q Looks to me like there is a total of 14 items that were bought in this group. Is it your testimony that you only have eight of them?

A That's right.

Q And you don't know where the other six are?

A I don't remember that there were that many bought, Mr. Bowles. I just know what I have. I don't have a recollec- [2135]
tion of how many were purchased.

Q Let's go on. 277 is a fine French gilt bronze plateau for $1,300 with picture. Do you know where that is, Mrs. Smith?

A No, I don't.

Q 278 is a pair of octagonal plateaus also in that same picture. What became of those, Mrs. Smith?

A I don't know.

Q That was $2,400, I believe, Mrs. Smith.

A That's what it looks like.

The Court: Someone who put my book together made a terrible mistake. I go on here, and next page is missing, and I just can't seem to follow it.

Mr. Bowles: Mine is working fine. Let me see the Court's.

The Court: That wouldn't be the proper attitude to say "mine's all right, and tough luck on yours."

Mr. Bowles: I didn't say that.

The Court: Well, I have a lot of interesting notes in there. I'd like to have that back.

Mr. Bowles: Can you indicate where you were missing pages?

The Court: Next series after we finished with 276.

Mr. Bowles: Well, 278 is—

The Court: Blank.

Mr. Bowles: Blank.

Mr. Engstrand: I have 278. [2136]

Mr. Bowles: So do I. If you will look back, you will see that the item pertains to a plateau shown

on the picture in a prior—that will give you a description of that.

The Court: Okay.

Mr. Bowles: We'll get you a description. You can find it in the catalog there.

Mr. Engstrand: Impose upon Jeannie to make a copy of that.

The Court: Well, I'll take care of it.

Mr. Engstrand: We do have one in evidence, which does have.

The Court: Okay. I didn't want you to think I was slow, that's all.

By Mr. Bowles:

Q 283, I think, is next—and I hope that the Court has a copy there—a $1,000 item, Italian carved framed mirror, Mrs. Smith. Do you know where that is?

A Well, I suppose it could be so many places in the hotel.

Q That's true of a lot of mirrors, isn't it?

A Yes.

Q And when you can't describe them, and you don't have pictures of them, you have trouble finding them, don't you?

The Court: Is this 72 inches—this mirror is 72 inches high?

The Witness: Yes.

Mr. Bowles: Yes. [2137]

The Court: That's a big mirror.

The Witness: I'm afraid to guess. I think I might know where it is, but I'm afraid to guess because I may be wrong.

The Court: Mrs. Smith—guess for me, okay?

The Witness: I think that it's possible that it's in the Fleur-de-Lis room.

By Mr. Bowles:

Q The Fleur-de-Lis room is the room where the carriage and the little urns and the other plateau were?

A That's right.

Q That were taken upstairs. The Court has a picture of the Fleur-de-Lis room there.

The Court: Yes, I recall it.

Mr. Engstrand: Can I interrupt? Was 283 on the list?

Mr. Bowles: What list?

Mr. Stechel: 283.

Mr. Bowles: 283, 183, 425, and 445 were all last minute—to our last minute determination, that we didn't know where they were, that were added after that list was written up.

Mr. Engstrand: Should we add it?

Mr. Bowles: 283 should be in there also, as should 445.

Mr. Engstrand: And the dollar amount—$1,000?

Mr. Bowles: 445 was $900. [2138]

By Mr. Bowles:

Q I think we are on 289, Mrs. Smith. Is that the next one that you have?

A Yes.

Q Bronze firewell section. Is this something you know of, and where it is residing today?

A No. I would hope that it's in one of the six fireplaces that we have in the hotel.

Q But you would just—

A I don't know.

Q All right. 294. This is a $2,900 Louis the XVth cabinet, bronze mounted.

A 294?

Q Do you have a 294 there? It's down at the bottom of the page there.

Does the Court have a copy of 294?

The Court: Yes, I came through all right on that one. Mrs. Smith, I think you will find it right down there.

The Witness: Yes. Thank you. Isn't there a picture of that somewhere?

By Mr. Bowles:

Q It would help us find it if it were, but—

A Are you sure that's the right amount of money, Mr. Bowles?

Q Well, we can check the invoices, this list that is marked 'FFF'—which I keep wanting to say is your list.

A Oh, I think I do know where this is. I think this [2139]
is on the second floor outside the ballroom.

Q 294, the Louis the XVth rosewood cabinet?

A Yes outside the ballroom. Has a head of Diane on it. I can't be positive, but I think that must be the cabinet. It describes it.

Q The head of Diane is at the west end?

A It's against the Normandy room.

Q Let's go back to that brochure again. This is, again, 'III,' Exhibit III. Is that the one you are referring to?

A No, it's against the other wall. This is the wall into the mall; it would be the wall on the right of that.

The Court: Well, I guess we are getting a location for that.

Mr. Bowles: Just a minute, Your Honor, I've got something I want to check.

By Mr. Bowles:

Q Mrs. Smith, look at 241 in your book, please. It's on page 86. This item was sold for $2,750. Isn't that the one that is outside the Normandy room?

A Yes, I've found it. Yes, it is.

Q Instead of the one you just described?

A Yes.

Q —as 294?

A Well, of course, I don't know what the other one looks like. But this one is outside the Normandy room, and I take it you don't know where 294 is? [2140]

A Not just off the top of my head, without thinking about it.

Q So we can correct the record then, the suggestion that 294 might be outside the Normandy room is incorrect?

A Yes. 241 is outside the Normandy room.

Q And because the Court likes pictures so much—

A That's it.

Q All for you, sir.

The Court: Very good. Now, if we had a picture of 294.

Mr. Bowles: If we knew where it was we'd have a picture of it.

By Mr. Bowles:

Q Now, let's turn to 297. This is a nine-branch candelabrum, $1,600, with a picture. Can you tell us where that is, Mrs. Smith?

A No. Is that a set of three pieces?

Q I believe the pictures indicate the two on the outside are a pair, No. 296, and the one in the middle is 297, which is the one we are worried about right now.

A Oh, I see.

Q Do you know where that is?

A No.

Q Turn to 310, please. 310, Mrs. Smith, is a $4,500 Kirman rug, 20¾ feet by 12 feet 10 inches, pale blue ground ornamented in multi borders, rose, blue, and gold. Do you know where that is?

A I know this rug and two other Kirmans were kept in [2141]

the room behind the ballroom, storeroom behind the ballroom, and were used from time to time in the ballroom along with pieces of carpeting died to match the beige in the background of the other two rugs. And they were used when they didn't want the ballroom to be so live, and when they didn't want danger of food falling on the parquetry floor when they were serving banquets. I don't know where they are now.

Q Do I understand that this $4,500 rug was rolled up and put in a storeroom?

A No, it was used in the ballroom.

Q But they would roll it up, and take it out when you didn't want to use it in a ballroom, and stick it in a storeroom back there?

A Yes, because they used the ballroom for dancing and parties where they didn't want carpeting, and then they had other pieces of carpeting that were made to fit around these rugs, to cover the entire ballroom floor in a pattern, which I designed so that they would fit.

Q The next is 330, Mrs. Smith. This is a walnut revolving desk chair, with a photograph.

A I don't suppose that's the one in the sub-basement. It looks vaguely familiar. Do we have those photographs of the sub-basement?

Q I didn't hear your answer.

A I was going to ask you if it could be one of the ones in the sub-basement. Do we have the photographs I might look at, because it looks vaguely familiar to me.

Q We have a few photographs of the sub-basement that [2142]
you are welcome to look at, but I don't know if you brought back with you the albums of the sub-basement you have been working on.

A You had some small pictures that you gave me to copy during my deposition. We could just take a quick look at that. I don't remember it being there, but it looks familiar.

The Court: Does that chair actually revolve?

The Witness: I don't remember. But it could. Dressing table benches frequently have a little platform so you can turn, much like this chair that I am sitting on.

The Court: Let's hope we can finish this book this afternoon.

Mr. Bowles: There are only five more items.

By Mr. Bowles:

Q Mrs. Smith, your photos of the sub-basement are much more complete. Perhaps we can bring those up again when you bring those back.

A You had some others that were a little smaller than these that show—

The Court: But to the best of your knowledge at this time, Mrs. Smith—

The Witness: I don't know where it is at this time.

The Court: But if you were to guess, you'd guess the sub-basement?

The Witness: It's possible. There are some similar looking pieces. [2143]

By Mr. Bowles:

Q 361, please. Louis the XVth style rosewood and Adajou tea table. What is amethyst?

A Well, it's a type of marble, color of marble, really.

Q Green?

A I beg your pardon?

Q Green?

A No.

Q What's the color?

A It's almost a lavender.

Q Do you know where that table is?

A I don't really know, but I think there were tables of this type that were used throughout the public areas of the hotel.

Q Mrs. Smith, you don't know that that table was used in the hotel, do you?

A No, I can't really say that. I don't remember it that well.

Q 383 is a Louis the XVth style rosewood bureau plat bronze mounted by Linke, costing, I believe, $6,750. Where is that, Mrs. Smith?

A I don't know.

Q Is that a picture attached on the next page?

A Yes, I was just looking at the picture.

Q And the cartonniere, or the top of that, is 384. That was $2,750.

A That must be a mistake.

Q Well, we can look at the invoices. Let's look at [2144]
this list that we refer to as 'FFF.' It's on the second page. Mrs. Smith, can you tell us where that nine or $10,000 set is?

A No.

Q No idea?

A No, I don't.

Q 426 is a Meissen porcelain nine-light chandelier, $1,200.

A Where are you, Mr. Bowles?

Q 426.

A I was still looking at this other one.
I don't remember that at all. I don't think it was used in the hotel.

Q You don't know where it went?

A No.

Q Mrs. Smith, backing up to the last two, 383 and 384, that set wasn't used in the hotel either, was it?

A I was just trying to remember if it was ever—if I ever saw it in the hotel. You're sure this is the right number?

Q Well, Mrs. Smith, take a minute and check the invoices, and check that other list, and satisfy yourself it is the right number.

Mr. Stechel: Your Honor, while the witness is checking the matter: some weeks ago—it's quite a long time ago—the trustees placed before Judge Enright, in view of our belief that there would be later in the trial very strong evidence of missing items—and Judge Enright took it under advisement, specifically said he would very seriously consider at [2145]
the appropriate time the trustees' motion for an inspection of the plaintiff premises. Now, the plaintiff has said as to a few items she actually has them in her home, she says she'll bring them back—and this is very gracious, to say the least—but we are not content that that is the whole story. And after this evidence is heard next week, next Monday we expect to have auditors here which will broaden the picture of missing items, we believe.

Now, here we have thousands upon thousands of dollars of valuable items where the witness says she has no idea of where these items are, although she was in charge, supposedly, of furnishing the hotel, and it is clear the Westgate paid $180,000.

We feel that, the spirit of resolving this matter, that there should be some sort of arrangement to verify that these are not in La Jolla, or in Los Angeles, or Borrego, or in Palm Desert, or wherever, these many, many places—and it troubles us, sincerely troubles us.

We want to call the pending motion that was taken under submission by Judge Enright to Your Honor's attention at this time.

The Court: All right. As I recall, I do remember something in the transcript about that. Let me refresh my recollection by reviewing that portion of the transcript, and you can consider the motion made anew, and we will take it under submission. [2146]

Mr. Stechel: Thank you, Your Honor.

The Court: This book, I might add, has been a fascinating discovery to me. I certainly am not familiar —as familiar as you gentlemen are—of this whole picture. But just casually leafing through here, I see pictures of the mirrors, and all of these things we have been talking about. This is a great aid. Because of my—I won't call it a fetish—but because of my fascination with photographs, I'm just disappointed I couldn't have it sooner. It would have made this whole matter a lot more meaningful. But I shall recoup.

Mr. Stechel: Good book. It is very interesting.

The Court: Fascinating book. I came across that mirror with all the birds, and the fruit trees, and it's so clear to me, it clarifies the testimony so well. So, I appreciate you gentlemen bringing this forward today.

By Mr. Bowles:

Q Mrs. Smith, have you had a chance to look in the pictures and the list again on 383 and 384?

A Yes.

Q You have no doubt that the hotel was billed for those two items purchased out of the auction?

Mr. Engstrand: Well, the documents speak for themselves.

By Mr. Bowles:

Q Well, she said she wanted to check it, counsel.

A It certainly appears from the invoice that that's correct. [2147]

Q And, Mrs. Smith, you have told us many times that you were in charge of the decorating of the hotel?

A That's right.

Q And those two items were never used in the hotel, were they?

A No, not that I recall.

Q And you can't tell us where they are?

A No.

Q 445 is, I think, the last one in the book. That's a pair of Jenon Dolls that you believe to be in the lobby, is that right?

A I'm not sure that they are in the lobby. They are at either one of the places, the lobby or the Fontainebleu Room.

The Court: Does that do it, Mr. Bowles?

Mr. Bowles: There's one other item, your Honor, that we will touch on while we are just in these books so there is no mistake. The book that you have had in it a picture at page 142, Mrs. Smith, of a large Meissen mirror.

Mr. Ardoin: No, that's in the locator book.

By Mr. Bowles:

Q I'm talking about the catalogs, please.

A Oh, sorry. What did you say, Mr. Bowles?

Q Turn to page 142, please.

A Yes, I have them.

Q Recognize that mirror?

A Yes, I do.

Q Is that the one that is stored down in the basement [2148]
of the Plaza Hotel that Mr. Smith claims to be his?

A It was when I saw it last.

Q It is in a big crate down there?

A It was crated, yes.

Mr. Bowles: That, I think, is a good place to stop, Your Honor.

The Court: All right. Now, Mr. Bowles, let me ask you, do you have any further cross-examination of Mrs. Smith? And I recognize that—

Mr. Bowles: I don't think so in this particular area of the auction, Your Honor. I would like to think that over overnight, but I think that I have completed the auction to my satisfaction.

The Court: Well, as you know, we are trying to come to an understanding, and I have promised Mr. Stechel to afford him his right to cross-examine Mrs. Smith, and I would like to accomplish that as soon as possible. And I would appreciate it if you would yield, and let him.

Mr. Bowles: Your Honor, at the court's request, and reserving the right to pick up if it is necessary at some later point, I would certainly have no objection to, whenever we start again or at this time, letting Mr. Stechel start his cross-examination.

The Court: Well, I would note Mr. Stechel constantly ends up coming on to the scene or coming on to the stage at the podium when there's five or ten minutes left. And I think that he may impute to me [2149]
a devious plan.

Mr. Stechel: No, I don't.

The Court: I'm saying that in jest. I would think it would be appropriate to adjourn for the day at this time. I don't know about you gentlemen, but I have to just sort out all the papers.

Mr. Bowles: Does the Court have enough paper?

The Court: Overwhelmed.

Mr. Bowles: The Court wished to be overwhelmed with paper today.

The Court: And when we reconvene the taking of testimony, then we will afford you your opportunity, Mr. Stechel, taking into account now that you have planned for the auditors to begin on Monday.

Mr. Stechel: Right. Monday I would go with the auditors. And then when they were completed, if we're still trying the case, I would then be very happy if I am afforded the opportunity to start the cross of Mrs. Smith, after the auditors.

The Court: Right.

Mr. Stechel: I would like to get that in because it is a matter of subpoenaing them, and getting them on the stand—and your honor knows the logistics, and so forth.

The Court: Yes, right. Is that agreeable with you, Mr. Engstrand?

Mr. Engstrand: May I infer that the auditors will have some testimony that you might like to ask [2150] Mrs. Smith about?

Mr. Stechel: Well, it might turn out that way too. That's another element, I suppose.

Mr. Engstrand: Well, are we going tomorrow?

The Court: Well—

Mr. Engstrand: That's what my confusion is.

Mr. Stechel: No, I don't think we're going tomorrow.

The Court: More or less reserved the morning for these other matters that I had in mind.

Mr. Engstrand: Yes.

The Court: And we have been going four days this week. I think it is appropriate.

Mr. Engstrand: Yes. Well, you know the plans about Mr. Smith tomorrow, and—

The Court: What I would like to do, I would like to have the reporter here in the event there is anything we have to put on the record.

Mr. Stechel: I take it you want us here tomorrow then?

The Court: Well, now one could appear for all, or something. I think we ought to get his position on the record for the purpose of protecting all the parties' rights—including his, I might add. And then I consider nothing further on the record, and hopefully I want to discuss with Mr. Smith and Mr. Sheridan ancillary problems in private, confidentially.

Mr. Stechel: I would be happy, Your Honor, to
[2151]
begin some cross now. I mean, I'm not saying that it should be done, but I am prepared to start.

The Court: Fine. I know you are. But I really have some—

Mr. Stechel: All right. Okay.

The Court: You know, people say that all judges do is sit out in open court, but I do have quite a bit to do in there.

Mr. Engstrand: Will the auditors be here Monday?

Mr. Stechel: I expect that we will call the auditors Monday.

Mr. Engstrand: Do you have a prediction of the length of time?

Mr. Stechel: I really don't, to tell you the truth. And, of course, your cross would also influence that, and Mr. Bowles' questions, whatever they may be. It will take quite a while.

The Court: It won't take Monday, Tuesday, and Wednesday, would it?

Mr. Stechel: It's conceivable. I really honestly can't say. They will bring in a trunk, a big trunk of accountants' records. Your Honor may have to come off the bench to look at some of these spread sheets. It may take a little while to fully explain what they have done, and present the documents, and explain it—and then there will be examination, and so forth.

Mr. Engstrand: Will it be of any benefit to discuss
[2152]
it a little bit?

The Court: Ahead of time?

Mr. Engstrand: Ahead of time, right now—have you been able to interview them so you know?

Mr. Stechel: Well, I'm somewhat familiar with the work that's been done.

Mr. Engstrand: What is going through my mind is just the question of relevance, and, you know, if we can shorten up anything by keeping out irrelevant material, we ought to. And I assume you consider it relevant or you wouldn't be bringing it in.

Mr. Stechel: Well, everything has relevancy that they will produce, I think. I have summarized, one, that there will be a comparison to the number of

items billed to Westgate, and the number of items in inventory there. So that goes to the whole question.

Mr. Engstrand: I'm sure it would. It does no good to talk in the abstract.

The Court: Why don't we Monday morning, if we get in at 9:00 o'clock, review amongst ourselves immediately, and start at 9:30 on the record.

Mr. Stechel: With the auditors?

The Court: With the auditors, right.

And, Mrs. Smith, thank you very much. You are excused for now.

The Witness: Thank you, Your Honor.

Mr. Bowles: 9:00 o'clock tomorrow?

The Court: I think that's when Mr. Sheridan is [2153]
coming in.

Mr. Bowles: Is that what you told him—9:00?

Mr. Engstrand: 9:00 o'clock tomorrow morning.

The Court: It will probably be closer to 9:30, because every morning I have a criminal calendar.

Mr. Engstrand: As I understand Your Honor's plan, you have a plan to talk to Mr. Sheridan and Mr. Smith in chambers yourself?

The Court: Right.

Mr. Engstrand: I think I would like to be here if anything is going to be put on the record. I don't need to sit here while you are talking to Mr. Sheridan and Mr. Smith.

The Court: No, no, certainly not.

Mr. Engstrand: I was wondering—could I be called, or something like that?

The Court: Well, I thought we would start, as soon as he arrived, we'd have him state his position for the record. Then I would excuse everyone, let you go back to your business, and attempt to handle this other matter in a fair and equitable fashion.

Mr. Engstrand: We'll be here at 9:00 o'oclock.

The Court: All right, 9:00 o'clock.

Thereupon, at 5:00 o'clock, P.M., Thursday, August 21, 1975, the hearing was adjourned. [2154]

State of California, County of San Diego—ss.

I, Thomas V. Dooley, Certified Shorthand Reporter, an official reporter (pro tem) of the Superior Court, County of San Diego, State of California, do hereby certify:

That as such reporter I reported in stenotypy the testimony of Maria Helen Smith in the foregoing matter on the 21st day of August, 1975; that my notes were later transcribed into typewriting under my direction, and the foregoing 125 pages contain a true and correct copy of the said testimony.

Dated at San Diego, California, September 22, 1975.

/s/ Thomas V. Dooley

THOMAS V. DOOLEY

Notary Public in and for the County
of San Diego, State of California

APPENDIX F.

Judgment.

United States District Court, Southern District of California.

Federal Deposit Insurance Corporation, as Receiver of United States National Bank, Plaintiff, vs. Westgate Plaza, a California corporation, et al, Defendants. No. 74-50-E.

Filed: May 7, 1976.

This matter having been specially referred by this Court to the Honorable Magistrate Harry R. McCue for the taking of evidence and the making and rendering of Findings of Fact and Conclusions of Law, Magistrate McCue having complied with the referral order and having made extensive Findings of Fact and Conclusions of Law which have been reviewed and studied by this Court, good cause appearing,

IT IS HEREBY ORDERED that said Findings of Fact and Conclusions of Law by Magistrate McCue in this matter, and the related matter, California Little America Co., a corporation, et al vs. Helen Smith, Civil No. 74-576-E, dated April 15, 1976, are adopted and judgment is entered as follows:

It is the judgment of this Court that:

1. The restraining order precluding Mrs. Smith from removing or affecting the involved furniture shall be and is [1086]

made a permanent injunction, this Court having found that title to all items, except as set forth in the Findings, is in others than Helen M. Smith.

2. As to those items specified in the Findings as belonging to Helen M. Smith, the temporary restraining

order is vacated and she shall be permitted to remove said items forthwith at her expense to locations of her choosing.

3. With respect to the furniture referred to in the Findings as the missing Jean Owings furniture, judgment is entered on the Findings and against Mrs. Smith and in favor of Westgate Hotel Management, Inc. in the amount of $49,766.00 plus interest at 7% from December 1, 1969 until date of entry, and thereafter on said total sum at the legal rate until satisfied.

IT IS SO ORDERED AND JUDGMENT IS HEREBY ENTERED ACCORDINGLY.

Dated: 5/7/76

/s/ William B. Enright
United States District Court Judge

[1087]

Second Amended Judgment.

United States District Court, Southern District of California.

California Little America Co., et al., Plaintiffs, v. Helen Smith, Defendant. Civil No. 74-576-E.

Filed: July 13, 1976.

This matter having been specially referred by this Court to the Honorable Magistrate Harry R. McCue for the taking of evidence and the making and rendering of Findings of Fact and Conclusions of Law, Magistrate McCue having complied with the referral order and having made extensive Findings of Fact and Conclusions of Law which have been reviewed and studied by this Court, the Court having retained jurisdiction over the issue of award of attorneys' fees and having reviewed memoranda and conducted a hearing on such issue, good cause appearing,

IT IS HEREBY ORDERED that said Findings of Fact and Conclusions of Law by Magistrate McCue in this matter and the related matter, Federal Deposit Insurance Corporation, as Receiver of United States National Bank v. Westgate Plaza, a California corporation, et al., Civil No. 74-50-E, dated April 15, 1976, are adopted and the motion of Federal Deposit [1468] Insurance Corporation, as Receiver of United States National Bank for attorneys' fees having been granted in part, an amended judgment is entered as follows:

It is the judgment of this Court that:

1. The involved premises, Suite 1900/1901 of the Little America Westgate Hotel, shall be and is hereby restored to the current owner of the Little America Westgate Hotel, California Little America Co., with full rights of possession and use.

2. Helen M. Smith is found to have unlawfully retained possession of the premises and owes rent in the amount of $63,750.00, plus interest at the legal rate of seven percent (7%) per annum from the date the rent was due, payable as follows:

(a) $20,000.00 to Federal Deposit Insurance Corporation, Receiver of United States National Bank;

(b) $43,750.00 to California Little America Co.

3. The counter-claims or cross-complaints of Helen M. Smith are dismissed with prejudice, judgments being entered in favor of the counter-defendants and cross-defendants.

4. Federal Deposit Insurance Corporation, as Receiver of United States National Bank is awarded attorneys' fees in the sum of $5,862.45 and costs of suit in the sum of $207.60 with interest to accrue on such sums at the legal rate from date of entry until satisfied.

This judgment is amended due to inadvertence, and is hereby entered nunc pro tunc June 23, 1976.

DATED: 7/13/76

/s/ William B. Enright

WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:
All parties
[1469]

Supreme Court, U. S.
FILED
AUG 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1730

In the Supreme Court of the United States

OCTOBER TERM, 1978

HELEN SMITH, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 106-115), the district court's memorandum decision and order (Pet. App. 102-105), and the magistrate's proposed findings of fact and conclusions of law (Pet. App. 1-101) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1979. A petition for rehearing was denied on April 10, 1979 (Pet. App. 116). The petition for a writ of certiorari was filed on May 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had adequate notice at trial that she could be found liable for conversion of certain antique furnishings.

2. Whether alleged defects in the magistrate's proposed findings and allegedly cursory consideration of those findings by the district court and the court of appeals call for the exercise of this Court's power of supervision.

STATEMENT

In 1967 petitioner formed what purported to be an independent interior design and decorating business known as International Interior Designs (IID). At about the same time, she purported to enter into and carry out an agreement to acquire furniture and decorative objects and to sell them to the Westgate California Corporation and its subsidiaries (Westgate) for hotels they planned to build and operate (Pet. App. 4). In fact, petitioner was not an independent seller of antiques to Westgate but was its agent, acting for Westgate in making purchases and committing Westgate's funds for those purchases (*id.* at 46-50). Virtually all of the operating expenses of IID were paid by Westgate and other corporations controlled by C. Arnholt Smith, Westgate's chief executive officer, who became petitioner's husband in 1968 (*id.* at 4, 47). Among the items purchased by petitioner as Westgate's agent were certain furnishings and fixtures sold at a public auction ("the Jean Owings auction") in 1969 (*id.* at 54-55).

In 1973, the United States National Bank in San Diego, California ("the Bank"), of which petitioner's husband was the president and chief executive officer, went into receivership, with respondent Federal Deposit Insurance Corporation named as receiver (Pet. App. 3, 5). A few months later, Westgate went into bankruptcy. The Bank

held a trust deed on the Westgate Plaza Hotel of San Diego ("the Hotel") securing a note on which Westgate had defaulted (*id.* at 1, 5).

The FDIC as receiver brought foreclosure proceedings in 1974 in the United States District Court for the Southern District of California. During the course of those proceedings, it became necessary to determine the ownership of items located, or believed to be located, on the premises of the Hotel, parts of which were then under petitioner's control (Pet. App. 1, 7, 107).[1] The court issued an order to show cause why such a judicial determination should not be made; petitioner was among those served with the order and was a party to subsequent proceedings in the action (*id.* at 1).

The district court referred the issued to a magistrate, who heard 34 days of testimony. Thereafter, the magistrate issued proposed findings of fact and conclusions of law, resolving ownership claims over the disputed items, including those known as "the Jean Owings auction" items. Petitioner had initially claimed that these items had been purchased by her husband with his own funds and that he had given many of them to her as gifts. The magistrate found, however, that the items were actually purchased with Westgate's funds and that they thus belonged to Westgate immediately prior to the time that the Hotel was sold by its receiver to the California Little America Corporation (Pet. App. 54-60). He further found that 23 of the items and parts of seven others had been within petitioner's control but were missing and unaccounted for, that these items had cost

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[1]This action was consolidated with a suit brought against petitioner for unlawful detainer of a penthouse apartment at the Hotel (Pet. App. 1). The suit was brought by FDIC counsel on behalf of the California Little America Corporation, which brought the Hotel after foreclosure under a purchase agreement that obligated the FDIC as receiver to assume responsibility for such litigation.

Westgate $49,766 plus sales tax liability, and that petitioner and her husband were liable to Westgate for the loss it had sustained (*id.* at 60-61). The magistrate also denied many of petitioner's ownership claims as to other items that were not missing (*id.* at 37, 50-54, 61-88) but upheld some of her claims (*id.* at 95-97).

The district court concluded that the magistrate's findings were not clearly erroneous and were supported by substantial evidence. It fully adopted the recommended findings and approved the magistrate's conclusions of law (Pet. App. 102-105) and accordingly entered a judgment against petitioner and in favor of Westgate Hotel Management, Inc., in the amount of $49,766 plus interest, representing the value of the missing items (*id.* at 224-225).

On appeal petitioner argued, *inter alia*, that she had not had adequate notice to defend against a charge of conversion and that entry of the judgment therefore denied her due process. The court of appeals held, however, that the record showed that "it was made clear to [petitioner] that [other parties to the litigation, including the FDIC as receiver of the Bank's assets] were holding her accountable for the missing items" and that "the issues were expanded in this respect" (Pet. App. 114-115). After considering this and numerous other contentions respecting fact findings adopted by the district court, the court of appeals affirmed.

ARGUMENT

1. The court of appeals correctly rejected petitioner's argument (Pet. 15-19) that she had no notice at trial that the status of items to which she had relinquished any claims was in issue and that she might be held accountable for items found missing after having been in her exclusive control. Due process is satisfied where the

party against whom a judgment is entered had actual notice of the issues litigated and resolved, whatever technical defects or omissions there may have been in the formal pleadings. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938); *REA Trucking Company* v. *NLRB*, 439 F. 2d 1065, 1066 (9th Cir. 197) (collecting cases). See also *Bruhn's Freezer Meats of Chicago, Inc.* v. *United States Dept. of Agriculture*, 438 F. 2d 1332, 1342 (8th Cir. 1971). The court of appeals found that petitioner understood that she was being held accountable for the missing items (Pet. App. 115), and that conclusion is supported by the record.

First, in a pre-trial statement filed in the district court, petitioner acknowledged that the proceedings concerned not only her claims to ownership of items apparently located on the premises of the Hotel but also ownership claims by others to property that was located in places under her control (R. 215).[2] Under California law, a party to a replevin action may be found liable for the value of property found to belong to the other party if a return cannot be made. Cal. Civ. Proc. Code §667 (Cum. Supp. 1979). See *Pacific Concrete Products Corp.* v. *Dimmick*, 136 Cal. App. 2d 834, 289 P. 2d 501 (1955).

Second, as petitioner concedes (Pet. 16-18), she was questioned at trial about the location of the missing "Jean Owings auction" items, which she had originally claimed as her own. Contrary to petitioner's suggestion (Pet. 16), the fact that she successfully objected at one point to being questioned about items to which she had relinquished claims does not show that her subsequent answers to questions about missing items specified in a list prepared by the FDIC (Exhibit JJJ) were understood to

[2] "R." refers to the Clerk's Record filed in the court of appeals.

be given merely as aids in locating the items. Before petitioner was asked about the items on the list, counsel discussed the relevance of the list in an off-the-record conversation (Pet. App. 181); later, during questioning, petitioner's counsel made no objection when the magistrate explained to petitioner that counsel for the FDIC was "trying to link you" to certain missing items and suggested that "maybe you've gotten them hidden someplace" (*id.* at 202).

Finally, as to the remark by counsel for the FDIC that, "[w]hen we say 'missing' on this list[,] all we are suggesting is that we have been unable to identify those items" (Pet. App. 184), it is clear from the context that he was merely explaining that, while some items on the list might turn out not to be missing, the compilers of the list had thus far been unable to identify the listed items as furnishings that remained in the Hotel. It thus does not support petitioner's suggestion (Pet. 17) that counsel was describing the limited purpose of the questioning.

2. There is no merit to petitioner's challenge (Pet. 6-15, 20) to the adequacy of the magistrate's fact findings. The magistrate made lengthy and detailed findings and identified the legal bases for his conclusions. The fact that the magistrate found more than one legal basis for denying petitioner's claims to a number of the items (see Pet. 7-8) is hardly a valid objection to those findings. Moreover, petitioner's disagreement with the magistrate's finding of an agency relationship between her and Westgate (Pet. 10-12)—a finding based on the magistrate's interpretation of her agreement with Westgate in light of the way the parties to the agreement actually performed (Pet. App. 21-25, 39-50)—raises purely factual questions that do not merit further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967).

Petitioner's related contention that the courts below gave inadequate scrutiny to the magistrate's findings is equally insubstantial. The district court reviewed the magistrate's findings pursuant to the appropriate "clearly erroneous" standard (Fed. R. Civ. P. 53(e)(2)) and adopted those findings after petitioner had availed herself of the opportunity to file objections and to make an oral presentation. The fact that the district court issued its decision after taking three weeks to consider the findings and nine days to consider petitioner's objections does not call for the exercise of this Court's power of supervision, anymore than does the failure of the court of appeals to write an opinion exceeding nine pages in length (see Pet. 20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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AUGUST 1979

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